Madras High Court Reports.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1862 AND 1863.

BY

WHITLEY STOKES, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

MADRAS:

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A.S.C.

SIR COLLEY HARMAN SCOTLAND, *Kt. Chief Justice.*

Sir ADAM BITTLESTON, *Kt.*,	*Puisne Judges.*
Hon. THOMAS LUMSDEN STRANGE,	
Hon. HENRY DOMINIC PHILLIPS,	
Hon. HATLEY FRERE,	
Hon. WILLIAM HOLLOWAY,	

Hon. THOMAS SYDNEY SMYTH, *Advocate General.*

Hon. JOHN BRUCE NORTON, *Acting Advocate General.*

MEMORANDA.

ON the 15th August 1862, the High Court was opened.

On the 13th January 1863 the Hon. H. D. PHILLIPS left on leave of absence.

On the 14th Jan. 1863 WM. HOLLOWAY, Esq., Civil and Sessions Judge of Tellicherry, entered upon his duties as Acting Puisne Judge.

On the 14th April 1863 the Hon. H. D. PHILLIPS resumed his duties.

On the 15th April 1863 the Hon. T. L. STRANGE resigned.

On the 16th April 1863 the Hon. WM. HOLLOWAY entered upon his duties as Puisne Judge.

Table shewing the number of Cases decided by the High Court from 15th August 1862 to 31st December 1863.

Original Side.		*Appellate Side.*	
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Motions.	174(*a*)	Special Appeals. . .	1,201
Sessions Cases. . .	174	Civil Petitions . . .	385
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	15th Aug. 1862.	31st Dec. 1863.
Regular Appeals	78	63
Special Appeals	695	239
Civil Petitions	48	27
Criminal Petitions . . .	25	12

(*a*) On the Ecclesiastical side, 31, in Equity, 78, in High Court cases, 24, on the Plea side, 41...Total 174.

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ADDENDA.

Page 4 To note (*b*) add 'see 1 Bomb. H. C. Rep. 16.'

„ 6 note—As to the irrecoverability of interest exceeding principal see 1 Bomb. H. C. Rep. 47 where Sausse, C. J., citing Manu chap. VIII çl. 151, *Vyavahára Mayúkha*, chap. V, sec. I, Steele's *Summary of the Laws and Customs of Hindú Castes*, p. 78: Vachespati Miçra in 1 Coleb. Dig. 63 and 1 Strange's H. L. 299, observed, " Thus the Rule of Hindú law is simply this, that no greater arrear of interest can be recovered at any one time, than what will amount to the principal sum; but if the principal remain outstanding, and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount of interest which may be thus received from time to time."

„ 15 note—see S. A. No. 27 of 1862, explained infra pp. XII, and 446.

„ 21 note (*c*) insert after (*c*) '1 DeG. F. & J. 226.'

„ 23 note line 4 after 'appeal' *insert* '1 DeG. F. & J. 226.'

„ „ line 20 *add* 'According to *Hamilton* v. *Mills* 29 Beav. 198, *Evans* v. *Salt* cannot now be treated as law.'

„ 27 The decision in this case appears erroneous. The Statute of Frauds, like the law of limitation (*Ruckmaboye* v. *Lulloobhoy Mottichund*, 5 Moo. I. A. Ca. 234) or set-off (*Macfarlane* v. *Norris*, 2 B. & S. 783) is a law relating to procedure, having reference only to the lex fori, *Leroux* v. *Brown* 12 C. B. 801; and the Statute of Frauds is as little part of the lex fori in the Mofussil as it is of that law in France.

„ 45 The first point decided in this case is overruled infra p. 363.

„ 49 note—add " *Vyavahára Mayúkha*, chap. IV, sec. V, § 25.'

„ 58 note—add '*Raja Haimun Chull Sing* v. *Koomer Gunsheam Sing*, 2 Knapp P. C. 211.

„ 62 The decision seems wrong. After 1848 the first defendant's husband had nothing to sell, and the second defendant consequently took nothing under the transaction in 1853. The doctrine of laches is inapplicable.

„ 70 add to Note '*Gossip* v. *Wright*,' 9 Jur. N. S. 592.'

„ 81 add to Note 'in the absence of an agreement to the contrary.'

„ 99 add to Note 'Now see Act XVIII of 1863.'

„ 101 as to receiving oral evidence, see 4 Moo. I. A. Ca. 441.
To note (*a*) add 'and see M. S. D. 1860 p. 50 ibid. 1861 pp. 6, 43.'

„ 162 add to Note '*Grell* v. *Levy*, 10 Jur. N. S. 210.'

„ 168 To the report of S. A. No. 53 of 1862 add 'Note.—The first point decided in this case was affirmed on 12th March 1864 in *S. A.* 486 *of* 1863, present Frere and Holloway, J J.'

„ 182 add to Note 'The adopted son inherits to his collateral as well as his direct relations by adoption. *Sumboochunder Chowdry* v. *Narraini Dibeh*, 3 Knapp P. C. 55.'

„ 183 add to line 13: 'He observed "that in two reported decisions of the Ṣadr Díwáni 'Adálat of Calcutta, suits on adjustments supported by oral evidence were not sustained."'

Page 200 add to the report of *Crim. P. No.* 101 *of* 1862 'NOTE: —See secs. 204, 205 of the Criminal Procedure Code, Act XXV of 1861.'

" 253 Add to the report of *S. A. No.* 576 *of* 1863 'NOTE.—See further as to suits for declaration of title under Act VIII of 1859, sec. 15, *S. A. No.* 1 *of* 1862, supra p. 184. By 13 & 14 Vic. c. 35, sec. 44, the Court of Chancery was empowered on a special case being stated, to make a declaration of right without consequent relief, and by 15 & 16 Vic. c. 86, sec. 50, (which is in the same words as this provision in the C. P. Code sec. 15) the Court may in any suit make binding declarations of right without granting consequential relief. Under this sec. 50, however, the Court has no power to make a declaration of right unless it could if necessary act upon it by giving consequent relief. (*Rooke* v. *Lord Kensington*, 2 K. & J. 753. Nor can the Court make a declaration of future rights, (*Lady Langdale* v. *Briggs*, 26 L. J. Ch. 27, 45: 2 Jur. N. S. 982), nor a prospective declaration guarding against a claim which may never be made (*Jackson* v. *Turnley*, 1 Drew. 617), nor declare a merely legal right, (*Trustees of Birkenhead Docks* v. *Laird*, 4 DeG. M. & G. 732 738.)'

" 257 add to NOTE 'and see *Mt. Imam Bandi* v. *Hurgovind Ghose*, 4 Moo. I. A. C. 403: *Doe* v. *E. I. Co.*, 6 Moo. I. A. Ca. 267.'

" 259 note (*c*) add '*Wakley* v. *Froggatt*, 9 Jur. N. S. 1248.'

" 283 line 200 *add* '*Norton* contended that the gardens in question were state-property, and also that the gift was void, as there was no seisin nor anything tantamount thereto: *Saḍagópáchárlu's Manual of Muhammadan Law* § 102: Elberling on *Inheritance, &c.*, § 258: Macnaghten's Principles of *Muḥammadan Law*, chap. V. sec. 2.

Branson replied.'

" 285 add to note 'As to the distinction between the public and private property of a *Hindú* sovran, see *The Secretary of State* v. *Kamachee Boye Sahaba*, 7 Moo. I. A. 476.'

" 286 To last line add '(*b*).'
at bottom of page add
'(*a*) Present Scotland, C. J. and Bittleston, J.
(*b*) Compare J. Grimm, *Deutsche Rechtsalterthuemer*, 2te Ausg. 100, 101.'

" 308 In *Pranshunker* v. *Prannath Mahanund*, 1 Bomb. H. C. Rep. 12 it was held that a suit will lie to obtain a binding declaration of the plaintiff's right to perform the duties of pújárí and receive the profits of a mandira. See Macpherson's *New Procedure of the Civil Courts*, 1860, p. 40: *Namboory Setapaty* v. *Kanoo-Colanoo Pullia* 3 Moo. I. A. Ca. 359.

" 311 line 7 *after* 'place' insert (*a*) and add a note '(*a*) see Mitáksh. ch. i, sec. IV, § 30: 1 Strange H. L. 198: 2 W. Macn. Prin. H. L.; 162 6 Moo. I. A. Ca. 547.'

" 328 add to note (*a*) 'a Hindú's will need not even be signed; and it has lately been held by the Madras High Court that it may be nuncupative: *S. A. No.* 448 *of* 1863, Feb. 27, 1864, present Phillips and Holloway, JJ.'

" 347 add to note (*a*) '30 Beav. 371.'

" 363 The second point decided in this case was affirmed in *R. A.* 74 *of* 1863 (April 4, 1864) present Scotland, C. J. and Frere, J.

Page 379 Add to note 'As to the presumption of agency which attaches to a wife living with her husband, see *Jolly* v. *Rees*, 10 Jur. N. S. 319.'

„ 396 add to NOTE 'The last English case as to setting aside a voluntary deed seems *Toker* v. *Toker*, 31 Beav. 625.'

„ 400 add to report of *S. A. No.* 75 *of* 1863 'NOTE.—See *Trimbuck Anunt* v. *Gopallshet Bin Mahadshet Mahadeo*, 1 Bomb. H. C. Rep. 27.'

„ 411 add to note (*b*) '*Domun Sing* v. *Kasee Ram*, 1 Moo. I. A. Ca. 366.'

„ 425 To line 25 add the following note.

'Draviḍa, from the name of a son of Vṛishabhasvâmin's, whence the adjective Drâviḍa, is the name of a people and the district inhabited by them on the E. coast of the Dekhan and also a collective name for five peoples : Ândhrâḥ karṇâṭakâçchaiva Gurjarâ drâviḍâstathâ mahârâshṭrâ iti khyâtaḥ pañchaite draviḍâḥ smṛitâḥ"—Böhtlingk & Roth. III, 796. "Drâviḍa pl. collective name for five peoples : kârṇâṭâçchaiva tailaṅgâ gujjarârâshṭravâsinaḥ, ândrâçcha drâviḍâ pañcha vindhyadakshiṇavâsinaḥ, ibid. 804.'

„ 436 add to note "see too *Gangbai* v. *Thavur Moolla*, 1 Bomb. H. C. Rep. 71.

On the *cy près* doctrine, *Langford* v. *Gowland*, 3 Giff. 617.'

„ 446 add to Report of S. A. No. 156 of 1863 'NOTE.—The Reporter is indebted to Mr. Mayne for the following note of *S. A. No.* 428 *of* 1862 referred to in the foregoing judgment. "S. A. No. 428 of 1862, June 15, 1863. Present Scotland C. J. and Phillips, J.:—Suit by plaintiff in 1859 to redeem kâṇam created in 1848, on ground of purappâd being in arrear. The first defendant kâṇamdâr pleaded that twelve years had not expired. The second defendant alleged an independent right as janmí. Original Decree dismissed suit, finding the kâṇam to be a forgery. On appeal, in which the first defendant does not seem to have appeared, the Sub-Judge reversed the decree, finding the plaintiff to be janmí, the kâṇam to be genuine, and the second defendant to have no title. The second defendant alone appealed:—Held that the objection that twelve years had not expired must be set up by the kâṇamdâr: therefore the plaint was not on its face bad, and that although it was set up in the original court, still as the judgment had not rested on it, and as the point was not taken in appeal it was not open to the second defendant to take it for the first time on special appeal.'

CORRIGENDA.

Page 12, lines 13, 15, 19. } *for* 'patta' *read* 'paṭṭá.'
" 25, line 8 from bottom. }
" 27, in marginal note, *for* 'cases in which' *read* 'cases in the Mofussil in which.'
" 46, line 4 *for* 'adoptor' *read* 'adopter.'
" 49, In the quotation from *Sarasvati Viláva* line 5 *for* sûtah *read* sûtaḥ : line 6 *for* -dayah *read* dayaḥ, line 8 *for* -thah *read* -thaḥ.
" 50, line 12 *for* 'beloning' *read* 'belonging.'
" 74, line 11 *for* '1860, which' *read* '1860. The suit.'
" 77, line 13 *for* 'Darmaliṇga' *read* 'Darmaliṅga.'
" 79, line 25 *for* 'wordly' *read* 'worldly.'
" 80, line 9 *dele* the comma after 'admits.'
" 81, *for* Mailara'ya *read* Mayila ra'yar.
" 87, line 12 from bottom, *for* 'cap. 1, sec. 2' *read* 'cap. II, sec. XI.'
" 88, line 15 from bottom, *for* 'Contracts' *read* 'Obligations.'
" 89, line 15 *for* 'Gent) (*b*)' *read* 'Gent (*b*)).
" 91, line 24 from bottom *for* '*Mayukha*' *read* '*Mayúkha.*'
" 95, line 10 *for* '(*e*)' *read* '(*c*).'
" 101, lines 2 and 6 from bottom, *for* '*Mayukha* *read* '*Mayúkha.*'
" 108, line 2 from bottom *for* '*aud*' *read* '*and.*'
" 113, line 24 *for* '*Mannaḍi*' *read* '*Mannáḍi.*'
" " " 26 *for* '1862' *read* '1863.'
Pages 114, 115 in margin, line 2, *for* '16, 17' *read* '15.'
Page 127, *for* 'Anonymous' *read* 'Tirumani Cheṭṭi *against* A'vundai Ve'lan."
" 143, line 4 from bottom, *read* '*Mayne* (with him *Srínivásáchâriyâr.*)'
" 162, marginal note, line 1, *read* 'by a vendee against a vendor.'
" 167, line 2 *for* 'V' *read* 'II.'
" 168, *for* 'Appellate' *read* 'Original.'
" 170, line 3 *for* 'respecting' *read* 'refreshing.'
" 182, line 5 from bottom, *for* '*Mayûka*' *read* '*Mayûkha.*'
" 249, in margin line 3 } *for* '1862' *read* '1863.'
" 250, " line 1 }
" 252, head note line 2, *for* 'more' *read* 'mere.'
" 190, line 12 from bottom, *for* Small Cause Courts' *read* 'Small Causes Court.'
" 200, line 19 *for* ' Jurissdiction' *read* 'Jurisdiction.'
" 206, line 18 *for* 'Námagiripeṭṭai' *read* 'Námagiripéṭṭai'
" 212, in marginal line 2 from bottom, *for* '*Case*' *read* '*R. C.*'
" 214, note (*b*) lines 3, 4 *for* 'held valid' *read* 'upheld.'
" 216, note (*b*) *for* 'Raghunanḍana' *read* 'Raghunandana.'
" 221 line 18, from bottom, *for* 'well' *read* 'well.'
" 237, line 6 from bottom, *for* 'letter' *read* 'letters.'
" 241, line 10 *for* 'Miyari Rámatívárí *read* 'Maiyâri Rámadevari'; line 11 *for* 'Sandiramie Pattya' *read* 'Sandirami Páttya'; line 15 *for* 'Samba' *read* 'Sambá'; line 26 *for* 'Sa'stri' *read* 'Sa'stri'.'
" 245, line 2 *after* 'Jurisdiction' *insert* '(*a*)'.
" 248, in margin, *for* '1862' *read* '1863'.
" " line 14 from bottom, *for* 'porapád' *read* 'pur'appâḷ'.
" 249, in margin *for* '1862' *read* '1863'.
" 252, in head note, line 2 *for* 'more' *read* 'mere.'
" 256, line 25, *for* 'karanams' *read* 'karaṇams.'
" 261, *for* 'poramkadam' *read* 'puramkaḍam.'
" 262, *for* 'Original' *read* 'Appellate'.
" 265, line 14 *for* 'panams' *read* 'paṇams.'
" 289, line 20 *for* 'Vírasvami' *read* 'Vírasvámi.'
" 298, line 13 from bottom, *for* 'Vaidyanádasvámi' *read* 'Vaidyanáthasvâmi.'
" 305, line 9 from bottom, *for* '157' *read* '1857.'
" 306, line 3, *after* 'am' *insert* 'of.'
" 329, *for* 'mukhyastan' *read* 'mukhyasthan.'
" 326, line 11 from bottom, *read* '*nattinér'páḍu.*'
" 343, line 1 and 6 *read* 'Veḷippálaiyan.'
" 364, note (*b*) line 3 *for* 'Brahmaṇa' *read* 'Bráhmaṇa.'
" 368, line 5 *for* 'Strange's' *read* 'Strange.'

Page 370, line 7 *for* '(*b*) *read* '(*a*)' Note (*b*) should be on p. 371 and refers to Act XXXII of 1839 mentioned in line 4 from the bottom of that page.
" 372, in margin, *for* 'Juue' *read* 'June.'
" 377, line 3 *after* 'wife' *insert* 'N.'
Pages 380, 381, 382, 383, 384 *for* A'tiya' *read* 'Atiya.'
" 393, 394 *for* 'manasuputra' *read* 'mánasaputra.' Note (*b*) at p. 393 should be from Skr. *mánasa* 'mental (a derivative from *manas*,' &c.
" 397, line 11, 12 *for* 'defendant' *read* 'plaintiff.'
Page 407, lines 11 *for* 'ánás' *read* 'anás.'
" 514, line 20 *for* 'previoulsy' *read* 'previously.'
" 416, note *for* '160' *read* '1860.'
" 417, note *read* '*Docker* v. *Somes*' 2 My. & K. 655.
" 419, line 12, *after* 'to' *insert* 'in.'
Pages 420, 421, 422, 425 *for* 'Andhra' *read* 'A'ndhra.'
" 425, lines 25, 27 *for* 'Drávida' 'Drâvidian' *read* 'Dravida' 'Dravidian.'
Page 438, line 16 *after* 'on' *insert* 'in.'
" 443, head note, line 2, *dele* comma after '21.'
" 445, head note, line 3 *for* '27 of 1862 (Supra p. 14) *read* '428 of 1862 (See Addenda).'
" " line 4 from bottom, *for* '27' *read* '428.'
" " note (*b*) *for* 'Supra p. 14' *read* 'See Addenda.'
" 452, line 18 *after* 'submitted' *insert* 'was.'
" 460, head note, line 2 *for* 'named' *read* 'names.'
" 464, note *for* '*drishta*' *read* '*drishta*.'
" 465, note line 1, *after* 'foreclosure *insert* 'gives.'
" 467, line 2 *for* ''was' *read* 'were.'
" 468, line 12 *for* 'amily' *read* 'family.'
" 479, 480 note (*a*) *for* 'Parivara' *read* 'Parivára.'
" 480, note line 10, *for* 'Dikshitiyam *read* 'Díkshitíyam.'
" 489, note line 3, *for* 'cl. XXIV' *read* 'CLXXIV.'

High Court of Judicature at Madras.

RULES OF THE COURT.

Rules providing for the qualification and admission of persons to be admitted Advocates, Vakíls, and Attorneys-at-law of the High Court of Judicature at Madras.

Advocates.

1. Any person possessing the qualifications and producing the certificate or certificates required by either of the four following rules, (numbered 2, 3, 4 and 5,) shall be qualified to apply to be admitted and enrolled an Advocate of the High Court at Madras.

2. Any person called to the degree of Barrister-at-law in England or Ireland; or being a Member of the Faculty of Advocates in Scotland.

3. The degree of Bachelor of Laws of the University of Madras and a certificate of having subsequently to the attaining of such degree, studied for 18 months with an Advocate of the High Court at Madras, as also of good character and conduct; such certificate to be signed by the Advocate with whom the applicant shall have studied.

4. The degree of Master of Laws of the University of Madras and a certificate, signed by the Registrars on the Original and Appellate sides of the High Court, of regular attendance upon the sittings of the Court, in accordance with such rules as the Judges may in that behalf prescribe, for 2 years; as also a certificate of good character and conduct signed by two Advocates of the Court.

5. Any person being an Advocate duly admitted and on the roll of Advocates of the High Court at Calcutta or Bombay, and producing the proper certificate of such admission and enrolment; together with a certificate of character or letter of recommendation from a Judge of the High Court

of which the applicant is an Advocate, or from the Advocate General of the same Presidency.

Vakíls.

6. Any person possessing the qualifications and producing the certificates or certificate required by either of the three following rules, (numbered 7, 8 and 9,) shall be qualified to apply to be admitted and enrolled a Vakíl of the High Court at Madras; but subject in the case of an applicant under rule 8, to his passing such an examination in matters of practice as the Court may prescribe. Provided that it shall be necessary in every case to give 2 months' notice of the intended application for admission by publication in the Gazette, and by affixing a copy of the same on the notice-board at the Court-house.

7. The degree of Bachelor of Laws of the University of Madras and certificates of having, subsequently to the attaining of such degree, studied for 6 months with an Advocate of the High Court at Madras, or a Vakíl entitled as such to practise on both the Original and Appellate sides of the said Court; and for a further period of 6 months in the office of an Attorney of the said Court: or a certificate of having studied for 12 months either with an Advocate, or Vakíl entitled to practise as aforesaid, or in the office of an Attorney; as also in either case a certificate of good character and conduct. Such certificates or certificate to be signed by the Advocate, Vakíl and Attorney with whom, or in whose office the applicant shall have studied.

8. The degree of Bachelor of Laws of the University of Madras, and a certificate signed by the Registrars on the Original and Appellate sides of the High Court, of regular attendance upon the sittings of the Court, in accordance with such rules as the Judges may in that behalf prescribe, for 2 years subsequently to the time of attaining such degree:—as also a certificate of good character and conduct signed by two Advocates or an Advocate and a Vakíl.

9. Any person producing the proper certificates or certificate of his having kept six terms, at one of the Inns of Court in London and of regular attendance on the course of Law lectures whilst keeping such terms, as also of his having passed one of the examinations provided for students; toge-

ther with a certificate of subsequent study for 9 months with an Advocate of the High Court at Madras or a Vakíl entitled as such to practise on both the Original and Appellate sides of the said Court, or in the office of an Attorney of the said Court, and of good character and conduct: such last mentioned certificate to be signed by the Advocate, Vakíl or Attorney with whom, or in whose office the applicant shall have studied.

Attorneys-at-Law.

10. Any person possessing the qualifications and producing the certificates or certificate required by any of the following rules, (numbered 11, 12, 13, 14, 15 and 16,) shall be qualified to apply to be admitted and enrolled an Attorney-at-Law of the High Court at Madras: but subject, in the case of an applicant for admission under rules 12, 13 and 16, to his passing such examination as to his professional competency as the High Court shall direct. Provided that it shall be necessary in every case to give two months' notice of the intended application for admission, by publication in the Gazette, and by affixing a copy of the same on the notice-board at the Court-house.

11. Admission and enrolment as an Attorney or Solicitor in one of Her Majesty's Courts at Westminster or Dublin with the proper certificate of such admission and enrolment: as also a certificate of good character and ability signed by the Master or Masters with whom the applicant shall have served his Clerkship in England or Ireland.

12. Matriculation at any of the Indian Universities and service as articled clerk to an Attorney of either of the High Courts of Judicature in India for 4 years, with a certificate of good character and ability signed by the Master or Masters with whom the applicant shall have served his clerkship: subject to examination as above provided in Rule 10.

13. Service for the period of 7 years as Registrar or Assistant Registrar on the Original side of the High Court at Madras, or as Judges clerk; or the same period of service in any two of the said offices: subject to examination as above provided in Rule 10.

14. The degree of Bachelor of Laws of any Indian University, and service as articled clerk to an Attorney of any of the High Courts of Judicature in India for 2 years, subsequently to the attaining of such degree; or for 5 years either as Registrar or Assistant Registrar on the Original side of the High Court at Madras, or as Judges Clerk, or in any two of such offices; with a certificate in the former case of good character and conduct signed by the Master or Masters with whom the applicant shall have served his Clerkship.

15. Any person being an Attorney duly admitted and on the roll of Attorneys of the High Court at Calcutta or Bombay, and producing the proper certificate of such admission and enrolment; as also a certificate of good character and conduct signed by a Judge of the High Court, or the Advocate General or two of the leading Advocates in practice in the High Court of which the applicant is an Attorney.

16. Any person who was, with the privity and consent of the late Supreme Court, under service as an articled Clerk to an Attorney of the said Court, on the 15th August 1862; after he shall have served the full period of 5 years for which he was articled: subject to his passing an examination as above provided in Rule 10.

(Signed) C. H. SCOTLAND.
A. BITTLESTON.
H. D. PHILLIPS.
H. FRERE.
W. HOLLOWAY.

1st *October* 1863.

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ADDENDA AND CORRIGENDA.

Page 21, note (*c*): insert after (*c*) " 1 DeG. F. and J. 226."

„ 23, „ line 4: after " appeal" *insert* " 1 DeG. F. and J. 226."

„ „ „ „ 20 *add* " According to *Hamilton* v. *Mills*, 29 Beav. 198, *Evans* v. *Salt* cannot now be treated as law."

„ 25, line 26 *for* " Ranga" *read* " Ranga" : line 32 *for* " patta" *read* " pattá."

„ 46, line 4, *for* " adoptor" *read* " adopter."

„ 49, In the quotation from the *Sarasvati Vilása* line 5 *for* " sutah" *read* sutaḥ: line 6 *for* " -dayah" *read* " dayaḥ" : line 8 *for* " -thah" *read* " -thaḥ."

At the end of the note, line 2 from bottom *read* " Vyavahára Mayúkha" and add a reference to that treatise, chap. IV, sec. V, § 25.

„ 77, line 7 *for* " Darmalinga" *read* Darmalinga."

„ 81, *for* " Mailaráya" *read* " Mayilaráyar."

„ 83, head-note, first line: *dele* the comma after " convicted."

„ 88, line 28 *for* " Contracts" *read* " Obligations."

„ 108, in margin, *for* " 15" read " 11".

„ 113, note, line 20 *for* " Mannadi" *read* " Mannádi" : line 22 *for* " 1862" *read* " 1863."

„ 114, in margin *for* " 16, 17" *read* " 15."

„ 115, in margin, line 2, *for* " 16, 17" *read* " 15."

„ 127, *for* " ANONYMOUS" *read* " TIRUMANI CHETTI *against* A'VUDAI VE'LAN."

„ 142, line 4 from bottom *read* " *Mayne*, (*Sríniváśácháriyár* with him.)"

„ 131, *for* " VEŃKAṬA'CHALA" *read* " VENKAṬACHALA."

„ 170, line 3 *for* " respecting" *read* " refreshing."

MADRAS HIGH COURT REPORTS.

Appellate Jurisdiction (a)

Regular Appeal No. 54 *of* 1861.

SARA'PU VENKADE'SAN ....*Appellant.*
MA'LAI I'SVARAIYYA' ....*Respondent.*

Where a Commissioner appointed under section 181 of Act VIII of 1859 to investigate the state of accounts between a debtor and a creditor, made his report, on which the judgment appealed against was founded, the High Court, on a regular appeal, refused to take a fresh account.

1862. *August* 30. *R. A. No.* 54 *of* 1861.

THIS was a regular appeal from the decision of L. C. Innes, the Civil Judge of Nandayal, in Appeal Suit No. 7 of 1860.

Miller for the appellant, the defendant.

Mayne and *Rámánuja Ayyangár* for the respondent, the plaintiff.

The Court delivered the following judgment.

This was a claim on a bond for rupees 4,062-8-0, with interest from the 1st September 1853, the date of its execution.

The defendant admitted the bond; but pleaded a set-off; and that the amount had been liquidated by subsequent payments at different dates.

Under the provisions of section 181 of the Code of Civil Procedure, a Commissioner was appointed to investigate the

(a) Present Phillips and Frere, J J.

1862. August 30. R. A. No. 54 of 1861.

state of accounts between the parties; and on his report the Civil Judge passed judgment in favour of the plaintiff for the sum of rupees 2,652-6-4, being the net amount found to be due by the defendant, with interest on the principal of the bond to the date of the decree.

The defendant has now appealed against this decision.

We are of opinion that the defendant has failed to show that his objections to the original decree rest on any tenable grounds. His vakíl has endeavoured to argue that if the Court should now take a fresh account, it will be found that the plaintiff is indebted to the defendant. But we do not think it was the intention of the legislature that such a course should be followed in appeal, or that the materials on which the report of a commissioner is based should be again examined and scrutinized by the appellate court in detail, in a case in which the report of the Commissioner, prepared under the rules contained in section 181 of the Code of Civil Procedure, has been approved of by the Court of first instance. To enter *de novo* on such an enquiry would entirely defeat the intention of the legislature in framing that enactment, the object of which was to shorten and simplify the procedure of the Courts in suits relating to matters of account.

We therefore affirm the original decree, and adjudge the defendant to be further liable for the payment of interest on the net sum of rupees 2,652-6-4 from the date of the decree of the Civil Judge. The defendant will be charged with the costs incurred in the appeal suit.

Decree affirmed.

Appellate Jurisdiction (a)

Special Appeal No. 504 *of* 1861.

TANUVIYA'N and others..................*Appellants.*
VALAGANA'DA and others................*Respondents.*

Where no paṭṭás and muchalkás have been exchanged between the parties, occupants of land cannot be sued for its proceeds, even though they have admitted the plaintiffs to be the proprietors.

THIS was a special appeal from the decree of J. H. Goldie, the Civil Judge of Tinnevelly, in Appeal Suit No. 124 of 1860. The original suit was instituted by the plaintiffs to establish their right to 3,561$\frac{8}{32}$ chains of punjey land and 29,480 palmyra-trees situated in the village of Kálváy, and to recover rupees 1,667-7-0, the value of the produce of the palmyra-trees from faṣlí 1266 to faṣlí 1268 (A. D. 1856 to 1858). The Civil Judge, finding that there was not sufficient evidence of the plaintiffs' title, dismissed their suit. 1862. September 1. S. A. No. 504 of 1861.

Saḍagópáchárlu for the appellants, the plaintiffs.

Mayne for the respondents, the defendants, referred to Regulation XXX of 1802, sec. 6 and Regulation V. of 1822, sec. 9.

The following judgment was delivered.

We consider that the plaintiffs have established no legal claim against the defendants, and that it was proper that the suit should have been dismissed; but that the grounds upon which the Civil Judge has decided against the plaintiffs, are not those upon which he should have acted.

The Civil Judge has found that the defendants have acknowledged the plaintiffs as the proprietors of the land they occupy. The suit has been brought to recover from the defendants the proceeds of the land. These are designated damages, but in fact are rent. But as no paṭṭás and muchalkás have been exchanged between the parties, such a claim, pursuant to section 6 of Regulation XXX of 1802 and section 9 of Regulation V of 1822, is not recoverable at law.

(a) Present Strange and Phillips, J J.

In declaring that the plaintiffs have no right at present to oust the defendants, the Civil Judge has gone beyond the requirements of the case, the plaintiffs not having sought to oust them.

With these observations we dismiss the special appeal with costs.

Appeal dismissed.

NOTE.—See *S. A. No.* 6 *of* 1847 Madras Sadr Dec. 1851, p. 262; *S. A. No.* 58 *of* 1857 M. S. D. 1857, p. 145.

Appellate Jurisdiction (a)

Criminal Petition No. 40 *of* 1862.

THE QUEEN *against* VAIYA'PURI GAUNDAN.

A Sessions Judge is bound to allow a prisoner whose conviction he has confirmed to execute a vakálat-náma to appeal.

1862. *September* 8. *Crim. P. No.* 40 *of* 1862.

IN this case it was alleged that J. W. Cherry, the Sessions Judge of Salem, had refused to allow a prisoner whose conviction he had confirmed, to execute a vakálat-náma to appeal, on the ground that no appeal lay against his decision under section 428 of the Criminal Procedure Code. That section enacts that "except as provided in section 405 of this Act, sentences and orders passed by an appellate court upon appeal shall be final."

Mayne for the prisoner.

PER CURIAM:—This was not a point which the judge could decide. Let him allow the vakálat-náma to be executed and attested. *(b)*

(a) Present Strange and Phillips, J J.

(b) Ex relatione Mr. Mayne. The allegation of the refusal turned out to be erroneous.

Appellate Jurisdiction (a)

Regular Appeal No. 57 *of* 1861.

KA'KARLAPU'DI SI'TA'RA'MARA'J.................*Appellant.*

UPPALAPA'DI JA'NAKAYYA and others.........*Respondents.*

The provision in section 4 of Regulation XXXIV of 1802 against an award of interest in excess of the principal refers only to the amount claimed for interest at the time the suit is brought.

Where part-payments were made on a bond and credited in discharge of the principal, and an action was brought for the balance of the principal and for interest, and the lower Court allowed a sum for interest as due at the date of the plaint which was greater than the principal, the High Court disallowed this excess. *(b)*

THIS was a regular appeal from the decree of F. Fane, the Agent at Vizagapatam, in Original Suit No. 161 of 1854. 1862. *September* 3. *R. A. No.* 57 *of* 1861.

The suit was brought for the recovery of rupees 2,967-4-1, being the balance of principal and interest due on a bond dated the 7th December, 1839. The first defendant appealed against the decree on the ground that the amount due had been incorrectly calculated. The calculation was made as follows:—

Principal secured by the bond..	2,042	0	10
Interest from date of bond to 3rd December 1846, at one per cent. per mensem..	1,716	15	4
	3,759	0	2
Deduct first payment on 3rd December 1846, on account of principal..	800	3	0
	2,959	0	2
Add interest on balance of principal, rupees 1,242-0-10, from 3rd December 1846 to 24th July 1847.................	84	9	7
	3,043	9	9
Deduct second payment, on 24th July 1847, on account of principal..	600	0	0
	2,443	9	9
Add interest on balance of principal, rupees 642-0-10, from 24th July 1847 to 11th July 1848.........................	77	0	0
	2,520	9	9
Deduct third payment, on 11th July 1848, on account of principal..	25	0	0
Add interest on balance of principal, rupees 617-0-10, from 11th July 1848 to 16th November 1854, the date of filing the plaint..	471	10	4
	2,967	4	1

(a) Present Strange and Phillips, J J.

(b) And (as the Reporter is informed by Mr. Mayne) refused to allow counter-interest on the payments.

1862. September 3. R. A. No. 57 of 1861.

	Particulars.		
Principal	617	0	10
Interest	2,350	3	3
Amount sued for and adjudged	2,967	4	1

Mayne for the appellant, the first defendant, referred to section 4 of Regulation XXXIV of 1802, which enacts that "where the interest on debts or on money lent may have accumulated so as to exceed the principal money, the Courts of Adawlut shall not decree a greater sum for interest than the amount of such principal money."

Sloan for the respondents, the plaintiffs.

The Court delivered the following judgment.

We consider that the account between the parties has been made up in a manner perfectly fair to the defendants. Their payments have been credited to principal, when they might have been credited to interest, the effect of which would have been to keep up the principal and to swell the further accruing interest. It is clear that the provision in section 4 of Regulation XXXIV of 1802 against an award of interest in excess of the principal has reference only to the regulation of the sum for interest that may be claimed at the time the suit is brought. That sum is to be so limited, but the limitation is not, as the defendants contend, to be applied to any earlier state of the accounts. We find, however, that the court below have adjudged to the plaintiffs a sum for interest as due at the date of the plaint, which is in excess of the principal, and this the law does not allow. We consequently disallow this excess, being rupees 308-2-5, as shewn hereunder:

Sum of interest adjudged	2,350	3	3
Sum of the principal	2,042	0	10
Excess	308	2	5

The costs in appeal are to be borne by the parties in the proportions now adjudged and disallowed.

NOTE.—See *S. A. No.* 18 *of* 1848, M. S. D. 1849, p. 65: *R. A. No.* 61 *of* 1847, M. S. D. 1850, p. 27: *R. A. No.* 40 *of* 1850, M. S. D. 1852, p. 6: *S. A. No.* 95 *of* 1853, M. S. D. 1854, p. 12: *S. A. No.* 172 *of* 1858, M. S. D. 1858, p. 191. For the Hindú law as to the irrecoverability of interest exceeding principal, see *Manu* cited 1 Coleb. Dig. 52; 1 Strange *Hindú Law* 299: 2 *Ibid.* 472. Regulation XXXIV of 1802, sec. 4 is repealed by Act XXVIII of 1855.

Appellate Jurisdiction (a)

Special Appeal No. 607 *of* 1861.

KOTTALE UPPI..*Appellant.*

KALLIYATT PANOLI KUÑÑI KUTTI and another...*Respondents.*

One of several co-mortgagors cannot appeal against a foreclosure decree when the equity of redemption has been sold before the institution of the suit.

THIS was a special appeal from the decree of W. Holloway, the Civil Judge of Tellicherry, in Appeal Suit No. 50 of 1861. 1862. *September* 6. *S. A. No.* 607 *of* 1861.

Mayne for the appellant, the plaintiff.

The Court delivered the following judgment.

The plaintiff held a mortgage on property belonging to the defendants from 1 to 9. He first brought his suit for recovery of the sum in which the mortgagees were indebted to him; but the District Munsif of Tellicherry dismissed it on the ground that his remedy was to foreclose the mortgage by assumption of the mortgaged property, as provided for in the mortgage-bond. Upon this the present foreclosure-suit arose. It appeared from the answers of the first and tenth defendants that the equity of redemption had been sold to the latter before the institution of the second suit. The District Munsif, nevertheless, adjudged the property to the plaintiff in fulfilment of the penal condition of the mortgage-bond. Against this decision the first defendant appealed, whereupon the Civil Judge dismissed the suit, objecting to give effect to the condition in the mortgage-deed barring the mortgagor's right to redeem.(b)

(a) Present Strange and Phillips, J J.

(b) The decree of the Civil Judge was as follows:—"It has been ruled many thousand times [by the Madras Ṣadr 'Adálat] that no language in a mortgage-deed, however strong, can bar the equity of redemption, and that the mortgagee is entitled only to the repayment of the sum advanced, with interest. This of course may be paid by sale of the mortgaged property, should the mortgagor fail to comply with the terms of the decree. It is much to be regretted that when this plaintiff asked for what he was entitled to, the late Munsif of Tellicherry referred him to another suit. In this suit he appears asking for what the law cannot give him, and must bear his own costs, which each party will do."

1862. September 6. S. A. No. 607 of 1861.

However sound the decision of the Civil Judge, we consider that he was not competent to pass it on an appeal preferred by the first defendant. The appellant's interest in the land has, by his own account, ceased; and the tenth defendant, to whom the title is alleged to have passed, has submitted to the decree of the District Munsif.

We consequently set aside the decision of the Civil Judge, and affirm that of the District Munsif.

Appeal allowed.

Appellate Jurisdiction (a)

Civil Petition No. 284 *of* 1862.

Cæmmerer *against* Birch.

Ex parte Brooks.

No one but a party to a suit can appeal under section 11 of Act XXIII of 1861 against an order passed in such suit.

1862. September 8. Civ. P. No. 284 of 1862.

IN this case Cæmmerer was proceeding to enforce a judgment against Birch who had become insolvent, when Brooks, the official assignee of Birch, who was not a party to the suit, interposed on the ground that all Birch's property had vested in him. E. W. Bird, the Acting Civil Judge of Negapatam, passed an order rejecting Brooks' application. Brooks now appealed against the order.

Miller for the appellant, relied on sec. 11 of Act XXIII of 1861, which enacts that "all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be

(a) Present Strange and Frere, J J.

determined by order of the Court executing the decree, and not by separate suit, *and the order passed by the Court shall be open to appeal.*" 1862. September 8. Civ. P. No. 284 of 1862.

Mayne for the respondent Cæmmerer.

PER CURIAM:—As the official assignee was not a party to the suit, section 11 of Act XXIII of 1861, on which he relies, does not apply; and there is no appeal from the order passed by the Civil Judge in this matter(*a*).

Original Jurisdiction (*b*)

A'LVA'R CHEṬṬI and others *against* VAIDILIṄGA CHEṬṬI.

Act XIV of 1840 does not apply to contracts between Hindús.

By Hindú law a purchaser may recover in an action for breach of a contract to deliver goods not only double the earnest-money, but also damages for the non-delivery.

THIS was an action for the non-delivery of twenty-six bales of twist pursuant to five contracts which had been entered into between the plaintiffs, who were partners, and one E'gámbara Cheṭṭi deceased, of whom the defendant was executor. All the parties were Hindús. 1862. Sept. 12, 15, 16 & 17.

On the 16th November 1860, Késavalu Cheṭṭi, one of the plaintiffs, entered into three verbal contracts with the deceased for the purchase in all of fifteen bales of grey twist, five of which were to be at rupees 3-5-0 per bundle, and ten at rupees 3-5-6 per bundle. Five were to arrive by the *Bolden Lawn*, five by the *Sir Robert Sale*, and five by the *Trafalgar*. Késavalu paid five rupees earnest in respect of these fifteen bales.

On the 23rd November 1860, Késavalu entered into two verbal contracts with the deceased for the purchase in all of twelve bales of Turkey-red twist, at rupees 15-13-0 per double bundle. Six were to arrive by the *General Caulfield*, and six by the *Warren Hastings*. Késavalu paid five rupees earnest in respect of these twelve bales.

(*a*) *Ex relatione* Mr. Mayne.

(*b*) Present Scotland C. J. and Bittleston J.

1862. Sept. 12, 15, 16 & 17.

The plaintiffs received one bale of the grey twist that had arrived by the *Sir Robert Sale*, for which they paid rupees 350. But though the other vessels arrived, and the rest of the bales were demanded, the defendant had failed to deliver them pursuant to the contracts. At the times of such failure, the grey twist had risen above, but the red twist had fallen below, the contract-price.

The Advocate General for the plaintiffs.

Branson and *Arthur Branson* for the defendant.

First, the contracts should have been in writing, as Act XIV of 1840, which extends to the territories of the East India Company the Statute 9 Geo. IV. c. 14, was, as part of the law of evidence, part of the *lex fori*, and as such binding on Hindús. The earnest cannot help the plaintiffs, for there must be earnest in respect of each bargain, which is not the case here. There cannot be one earnest for several contracts. Otherwise there might be one earnest for all the contracts entered into during a series of years.

Secondly, if the Court hold the contract binding, the vendee is only entitled by way of damages to twice the amount of the earnest: 1 Strange's *Hindú Law,* 303: T. L. Strange's *Manual of Hindú Law,* p. 75.

SCOTLAND, C. J.:—The Indian Act XIV of 1840 expressly declares that it shall not be construed to affect any case which would not have been governed by the law of England if that Act had not passed. It is clear that the law and usages of Hindús must regulate all matters of contract between Hindús. And it is equally clear that according to Hindú law a written contract is not necessary. The Act therefore has no application as between Hindús. It is said that though that may be so as to the essentials of a contract, yet that the Act must be taken as part of the *lex fori* and therefore applicable. The answer is that the Act affects the contract itself and not merely the remedy. It enacts that "no contract shall be allowed to be good." The contract itself is made void. Upon the somewhat novel point taken by Mr. Branson—that if the Act applies, the payment of earnest does not help the plaintiffs, because, as he contends, there must be earnest paid in respect of each separate contract, and not one sum for earnest on several contracts,— it becomes unnecessary to give any opinion.

Another point taken was that according to the Hindú law the plaintiff could not recover more than double the earnest-money; and for this reference was made to Sir Thomas Strange's *Hindú Law*, p. 303, and also to Mr. Justice Strange's *Manual*, p. 75, where we find "should it (scil. the breach of contract) be on the part of the seller, he is liable to repay the earnest-money twofold." We think that this does not preclude a purchaser from recovering damages where he proves that he has sustained damages. It merely means that at all events the purchaser shall be entitled to a return of double the amount of the earnest-money.

The plaintiffs then are entitled as damages for the non-delivery of the grey twist, to the difference between the contract-price, and the market-price at the time delivery ought to have been made—that is, according to our calculation:

Per *Bolden Lawn*............	Rs.	156	4	0
Sir Robert Sale.........	„	62	8	0
Trafalgar................	„	46	14	0
	Rs.	265	10	0

As to the red twist, the subject of the fourth and fifth counts, we think the plaintiff cannot be said to have sustained any damage; for those goods appear at the time of the failure to deliver them to have fallen below the contract-price. We therefore can find only nominal damages on those counts; but adopting the Hindú law here where no actual damage is proved, we think that on those counts the plaintiffs are entitled to ten rupees, double the earnest-money on the contract for the red twist. The verdict will accordingly be for the plaintiffs—damages rupees 275-10-0.

BITTLESTON, J. concurred.

The Advocate General asked the Court to certify for costs.

SCOTLAND, C. J.:—Yes, we think that this was a proper case for trial in this Court.

Judgment for the plaintiffs for rupees 275-10-0.

Appellate Jurisdiction (a)

Special Appeal No. 839 *of* 1861.

GENGU REḌḌI....................*Appellant.*

ASAL REḌḌI......................*Respondent.*

Non-mírásí land left waste by a paṭṭadár may be granted by the Collector, without reference to the claim of the former occupant.

1862. *September* 13. *S. A. No.* 839 *of* 1861.

THIS was a special appeal from the decree of S. Marcar, the Principal Ṣadr Amín of Chittúr, in Appeal Suit No. 89 of 1861.

The original suit was brought in the District Munsif's court of Tiruppattúr, for the recovery of a field assessed at rupees 18-0-9. The field, which was situated in a non-mírásí district, had been held by the plaintiff on paṭṭa from 1848 to 1851. From 1851 to 1858 it lay waste. In 1859 the revenue authorities granted it on paṭṭa to the defendants. The District Munsif decided in favour of the plaintiff, and ruled that although the field had lain waste from 1851 to 1858, the Collector was not warranted in giving it on paṭṭa to the defendants to the prejudice of the plaintiff, who had been the former occupant. The Principal Ṣadr Amín affirmed this decision, and relied on the decree of the late Madras Ṣadr 'Adálat in Special Appeal No. 139 of 1858*(b)*.

Branson for the appellant, the second defendant.

Karuṇágara Menavan for the respondent, the plaintiff.

The Court delivered a written judgment, from which the following is an extract:—We consider the decrees below to be erroneous. The land having been left waste it was competent to the Collector, in protection of the public revenue, to assign the land for cultivation to the first applicant. As such the defendants have got possession, and they may not be ousted by the plaintiff.

The decree of the late Ṣadr Court, referred to by the Principal Ṣadr Amín, has been allowed by him a force it does not possess; as explained by the subsequent decree of that Court in Special Appeal No. 482 of 1860*(c)*.

We reverse the decrees below and dismiss the suit with costs.

(*a*) Present Strange and Frere, J J.

(*b*) M. S. D. 1859, p. 21.

(*c*) M. S. D. 1861, p. 112; and see M. S. D. 1858, pp. 43, 152, 160.

Appellate Jurisdiction (a)

Special Appeal No. 27 *of* 1862.

PAIDAL KIDAVU..............................*Appellant.*
PARAKAL IMBICHUNI KIDAVU.............*Respondent.*

Where a first káṇam-holder in his answer to a redemption-suit by a second káṇam-holder, for the first time denied his own káṇam and alleged an independent janmam right; *held* that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as káṇam-holder he was entitled; though the denial and allegation were false, and though his documents in support of such allegation were forged.

1862. *September* 22. *S. A. No.* 27 *of* 1862.

THIS was a special appeal from the decree of F. P. Pereira, the Principal Ṣadr Amín of Tellicherry, in Appeal Suit No. 219 of 1861.

The plaintiff in this suit was a second káṇam-holder, and sought to obtain possession of a paramba alleged by him to be the janmam property of the fifth and ninth defendants, who had assigned it to him on a káṇam mortgage of rupees 150, with authority to pay off a prior káṇam of rupees 50 held by the first four defendants.

It was contended by the first, second, and fourth defendants—and in this contention they were joined by the seventh defendant—that their káraṇavans had acquired the janmam right in the premises; that such right had been sold to the sixth, and that it was now in possession of the seventh defendant, his younger brother. The seventh defendant endeavoured to support his case by certain documents marked I and II, which were found to be forgeries.

Both the lower Courts decreed in favour of the plaintiff, to whom, after payment by him of certain sums as the value of improvements, it was adjudged that the paramba should be restored. The decree of the Principal Ṣadr Amín contained the following passage:—

"The seventh defendant's contention that even if his pretended jenm right were considered unestablished, he

(a) Present Scotland C. J. and Phillips, J.

1862. September 22. S. A. No. 27 of 1862.

cannot be dispossessed of the land, as the fifth defendant was bound to assign it on a higher mortgage to him in preference to any other party, deserves not a moment's consideration. He has signally forfeited that right by his own misconduct in attempting to defraud the proprietor by means of documents, marked I and II, which are evident fabrications."

Against this decree the seventh defendant appealed.

Mayne for the appellant argued that the plaintiff's káṇam was invalid as no demand for a fresh loan had been made on the prior káṇam-holders. He also contended that the Principal Ṣadr Amín was wrong in holding that the appellant had been guilty of any misconduct which rendered a previous demand upon him unnecessary.

Karuṇágara Menavan for the respondent, the plaintiff.

The Court delivered a written judgment from which the following is an extract:—The Principal Ṣadr Amín has assumed the validity of the seventh defendant's argument, that considering the defendants from whom he derived his title to be only káṇam-holders, it was nevertheless incumbent on the janmam proprietor, under the usage and custom prevailing in respect of káṇam mortgages, to afford to a prior káṇam mortgagee in possession under a káṇam of low amount, an opportunity of accepting or refusing a subsequent mortgage of higher amount, before dealing with and assigning the mortgaged land to an entirely new party. It is also to be inferred that but for the circumstances stated in his judgment, the Principal Ṣadr Amín would have recognized the first káṇam-holders as possessing a right resting on such usage and custom.

We are of opinion that it was not legally competent to the Principal Ṣadr Amín to annul any right which the prior káṇam-holder possessed, by way of punishment for the misconduct in the progress of the action, of which he considered the seventh defendant had been guilty; and as it has not been urged by or on behalf of the plaintiff or the janmí that there had been any refusal on the part of the first four defendants to make a further advance, and the contrary appears to be the fact; and as the janmí is not joined with

the new kánam-holder in suing the parties in possession of the land sought to be recovered, we reverse the decisions of the Courts below with costs payable by the plaintiff.

1862. *September* 22. *S. A. No.* 27 *of* 1862.

NOTE.—If the first kánam-holder had denied the janmí's title before the date of the second kánam, *semble* that it would not have been necessary to give him the option of making the further advance.

As to the necessity of giving a first *otti* mortgagee the opportunity of making the further advance required by the mortgagor—see *S. A. No.* 17 *of* 1860, M. S. D. 1860, p. 249.

Appellate Jurisdiction (*a*)

Special Appeal No. 732 *of* 1861.

CUTENHO.............................*Appellant.*

SOUZA..................................*Respondent.*

The Court will not relieve against the forfeiture of a lease caused by non-payment of rent, although the lessor on previous occasions has waived the forfeiture.

1862. *September* 24. *S. A. No.* 732 *of* 1861.

THIS was a special appeal from the decision of Ganapaiyya, the Principal Ṣadr Amín of Mangalúr, in Appeal Suit No. 79 of 1861, reversing the decree of the District Munsif of Mangalúr in Original Suit No. 707 of 1859. In this suit the plaintiff sought to cancel a mulgaini lease of land to the defendant, which provided that the rent thereby reserved should be paid within the third kist (March 31), and that the lease should be void in case the lessee should fail to pay the rent within the stipulated time, or act in violation of any of its terms, but that " if he conformed to those terms, he should enjoy the land from generation to generation."

Srínivásáchárıyár for the appellant, the plaintiff.

The respondent did not appear.

The Court delivered the following judgment.

This suit was instituted with the view of cancelling a lease granted to the defendant, on the ground that the defendant had violated its terms by failing to pay the rent for

(*a*) Present Phillips and Frere, J J.

1862. September 24. S. A. No. 732 of 1861.

the years 1858-59 on or before the date stated in the agreement, which provided that the lease should be void in the event of his not performing the above condition.

The District Munsif found that the defendant had failed to pay in accordance with the lease, and decreed a forfeiture in the terms of that agreement. But this judgment was reversed on appeal by the Principal Ṣadr Amín, who dismissed the plaintiff's claim, on the ground that he had received payment of the rent when overdue in previous years, and that the defendant therefore on the present occasion, seemed to be entitled to claim some indulgence.

The plaintiff preferred a special appeal against this decision.

We are of opinion that the judgment of the Principal Ṣadr Amín in this case cannot be sustained. It is admitted that the defendant has legally incurred forfeiture of his lease, and the fact that indulgence was shewn to him by the plaintiff on two previous occasions cannot be held to preclude the latter from now exercising his legal rights. We accordingly reverse the decree of the Principal Ṣadr Amín and confirm that of the District Munsif. The defendant, now special respondent, will be charged with all costs incurred by the plaintiff in the appeal and special appeal suits.

Original Jurisdiction (a)

AGNEW against MATTHEWS and others.

A testator, after requesting that his property be sold and the proceeds invested, gave the following directions :—"That a monthly stipend of rupees 15 be paid to my daughter E. S. for her own benefit and rupees 20 for the benefit of her two children during their minority. In like manner my daughter M. D. to be allowed by my executors monthly the sum of rupees 20 for her own benefit and rupees 50 for the benefit of her five children during their minority; and in the event of the demise of any of the abovenamed children occurring, the sum of rupees 10, to cease rateably as being the allowance for each child. That on each of the children attaining their age of majority of 21 years, I request that my executors pay to each of them severally and proportionally the full amount of interest accruing from my estate (the existing provision for my two daughters to continue during their natural life), and after their demise the said interest in like manner to revert to their heir or heirs in succession."

Held:—1st. That the several annuities to E. S. and M. D. respectively were annuities for their respective lives, and that both annuities were charged on the testator's estate.

2nd. That E. S. and M. D. were respectively entitled to receive during the lifetime and minority of their respective children the monthly sum of 10 rupees for each child; but that on the death of each child, or upon its attaining majority, the payment in respect of such child ceased.

3rd. That the share of each child under the will, would become vested only on its attaining the age of 21 years: that such share would vary directly as the number of children who had then died infants; and that on each child attaining majority it would take a contingent proportionate interest in the share of each of its junior brothers and sisters, which would become vested on the death of each of the latter under the age of 21 years.

4th. That the estate given to each child in its share was an absolute interest.

5th. *Semble* the rule in *Wild's Case* is not applicable to personalty.

THIS was a special case for the opinion of the Court as to the construction to be put on the will of John Kickwick, deceased. The will, so far as it related to the testator's property, was in these terms :— 1862. Sept. 18, Oct. 1.

"1. I request that all my property, moveable and immoveable, should be disposed of to the best advantage.

"2. That the proceeds of my property be placed in the Oriental Bank Corporation, and my executors are at liberty for the benefit of my estate to invest these sums on the mortgage of landed property with interest at 12 per cent. per annum.

(a) Present Scotland, C. J. and Bittleston, J.

1862. Sept. 18, Oct. 1.

"3. That the existing mortgagees be allowed the privilege of continuing to maintain the payment of interest unmolested so long as my executors may deem it safe.

"4. That a monthly stipend of rupees 15 be paid to my daughter Mrs. Eliza Stent, for her own benefit, and rupees 20 for the benefit of her two children (during their minority) viz. Ada Maria and James Kickwick Stent.

"5. In like manner my daughter Mrs. Maria D'Monte to be allowed by my executors monthly the sum of rupees 20 for her own benefit, and rupees 50 for the benefit of her five children (during their minority) viz. Jane Eliza, Ann Maria, Grace Matilda, John Clifford and Florence Emily Dickson, and in the event of the demise of any of the abovenamed children occurring the sum of rupees 10 to cease rateably as being the allowance for each child.

"6. That on each of the children attaining their age of majority of one and twenty years, I request that my executors pay to each of them severally and proportionably the full amount of interest accruing from my estate (the existing provision for my two daughters to continue) during their natural life, and after their demise the said interest in like manner to revert to their heir or heirs in succession."

Branson for the plaintiff.

Mayne for the defendants.

The Court took time to consider, and on Oct. 1st the following judgment was delivered by

SCOTLAND, C. J.:—The question upon which our opinion is sought by this special case is, what are the interests of the defendants respectively under the will of John Kickwick?

The testator, after providing for payment of debts and funeral expences, directs his property to be disposed of, and the proceeds to be placed in the Oriental Bank, with power to the executors to invest the same on mortgages, and to leave existing mortgages untouched. He then proceeds to the disposition of it, and the first bequest is in these terms: "That a monthly stipend of rupees fifteen be paid to my daughter Mrs. Eliza Stent (now Mrs. Matthews) for her own benefit, and rupees 20 for the benefit of her two children

during their minority." Upon this part of the will the question which arises is as to the interest of Mrs. Matthews herself; and we are of opinion that she is entitled to receive for her life rupees 15 a month, and that the testator's estate is charged with the payment of that sum. The general rules as to the construction of bequests of this kind are pretty well settled. Where there is in terms a gift of the interest or dividends or produce of the estate, and that gift is indefinite in point of time, such a bequest will generally carry the corpus absolutely; but when, on the other hand, the gift is in its terms simply a gift of so much a year, its effect is to give an annuity for life only. 1862. Sept. 18, Oct. 1.

The recent case of *Hill* v. *Potts*(a), which was referred to during the argument, turned upon the effect of the peculiar words there used, viz. "I give to A all my property, except 500*l.* a year which I give to B." But the Vice-Chancellor Wood (though considering the effect of the exception from A's gift to be that the 500*l.* a year meant so much of the estate as would produce 500*l.* a year), yet expressly says that it must be taken now upon the authorities that when you find nothing beyond the simple gift of so much a year to A, A takes it only for life; and similar language fell from Lord St. Leonards in the case of *Kerr* v. *The Middlesex Hospital*(b), where a direction to apply the produce of a testator's real estate in the purchase of annuities was held (Lord Cranworth dissenting) to give them in perpetuity. Where, as in *Stokes* v. *Cheek*(c), the direction is to buy a Government annuity, the intention of the testator that so much of the corpus of his estate as may be necessary for that purpose should be appropriated absolutely for the benefit of the legatee, is manifest; and that intention being clear the Court have felt at liberty to allow the annuitant to receive the money-value of the annuity, although the testator may have expressly forbidden it.

But the language of the will which we have to construe directs simply the payment of a monthly stipend of fifteen rupees spoken of as a provision for the testator's daughter, and *In Re Graves' Trust*(d) may be referred to as one of many cases supporting our construction.

(a) 31 L. J. Ch. 380.
(b) 2 D. M. & G. 576, followed in *Ross* v. *Borer*, 2 Johns. and H. 469.
(c) 27 L. J. Ch. 922.
(d) 28 L. J. Ch. 536.

1862. Sept. 18, Oct. 1.

The same observations apply to the bequest of Mrs. D'Monte; and we entertain no doubt that under the will the testator's daughters are entitled only for their lives to receive respectively the monthly stipends of fifteen and twenty rupees.

They are also clearly further entitled to receive during the lifetime and minority of their children the sum of ten rupees for each child; but on the death of each child, or upon its attaining majority, the payment in respect of such child is to cease. These payments may not, and we suppose probably would not, exhaust the testator's estate; and it was suggested that there being no residuary clause in the will, there was an intestacy as to the residue after deducting the 105 rupees directed to be paid to the testator's daughters during the minority of their children. But we think that the subsequent bequest to the children removes this difficulty, and that there could be no intestacy except in the event of all the children dying under twenty-one; and we proceed to consider what interest the children of the testator's two daughters take under this will.

First, we think that the interest of each child vests only on that child's attaining the age of twenty-one years, and not before. There is no prior gift, but the only words are "on each child attaining that age, I request my executors to pay." The time is annexed to the legacy itself and not to the mere payment. Then what is given? The proportionate share of that child in the full amount of interest accruing from the testator's estate. This provision therefore for the first time brings into distribution the whole of the testator's estate, but it clearly does bring it into distribution and gets rid, as we conceive, of any question of intestacy as to any part of the estate. It is as though the testator had said in so many words—whatever surplus of my estate may remain after payment of 105 rupees, is to be kept by my executors at interest until the eldest child attains majority, and then his share of the whole estate shall be paid.

The amount of the share which will vest in each child at twenty-one must depend upon the number of children then living. To take the simplest case—if, on the eldest attaining twenty-one, all the children are alive, his share would be one-seventh, and it would of course be proportion-

ately greater according to the number of children who had at that time died under age. But he would also, we think, further take a contingent proportionate interest in the shares of each of the other children, which would become vested on the death of each one dying under twenty-one. 1862. Sept. 18, Oct. 1.

In no other way can effect be given to the intention of the testator, as we gather it from the words used in the 6th paragraph of the will. But this leaves untouched the question upon which the argument before us principally turned, whether the estate given to each child in his share, was an estate for life only, with remainder over to his heir or heirs, or an absolute interest in the corpus?

Upon this part of the case, it was mentioned that the rule in *Wild's Case*(a) had been held not applicable to personalty; and it does appear that, though after great discussion that question was left unsettled in *Stokes* v. *Heron*(b), Lord Campbell, did, in the recent case of *Audsley* v. *Horn*(c), declare himself prepared to say deliberately that the rule in *Wild's Case* is not applicable to personalty.

But independently of that expression of Lord Campbell's opinion, we think on other grounds that the rule in *Wild's Case* has no bearing upon the question which we have to consider. The rule in *Wild's Case* applies to the construction of the words children or issue in a devise to one and his children or issue, when he has no children or issue at the time of the devise; and for the purpose of endeavouring as far as possible to effectuate the testator's intention, the rule was laid down that those words should be taken as words of limitation and not of purchase.

The words, however, which we have to construe are very different. The gift to the children is "during their natural life, and after their demise the said interest in like manner to revert to their heir or heirs in succession." Looking at these words, it seems probable that the testator intended that the corpus of his estate should remain for ever in the hands of his executors or their representatives, and that the descendants of his daughters' children should

(a) 6 Rep. 17.
(b) 12 Cl. & Fin. 180.
(c) 6 Jur. N. S. 205; 29 L. J. Ch. 201: S. C. before the M. R. 26 Beav. 195

1862. Sept. 18, Oct. 1.

in perpetual succession enjoy only the interest arising therefrom. But if such was his intention, that intention certainly cannot be carried into effect; and we see no ground for saying that more effect will be given to the testator's intention by holding that the children take for life with remainder over to the persons designated by the words "heir or heirs"—whether they should be construed to mean the heirs at law, according to *Re Rootes(a)*, or next of kin, according to *Evans* v. *Salt(b)*,—than by holding that the children take absolutely.

This latter upon the authorities, we consider to be the proper construction.

In *Britton* v. *Twining(c)* the words were that £20,000 in the 3 per cent. stock should be after the death of the testator's wife "firmly fixed upon the now infant boy William Cobb," and to be "so secured that he may only receive the interest of the same *during his life*, and after his decease to heir male of his body and so on in succession to the heir at law male or female," and Sir William Grant held that, though there was an express restriction for life, William Cobb took the £20,000 not for life only but absolutely.

This case seems to us very closely in point; and it has not been shaken by any subsequent decision. On the contrary, it is expressly recognized in the case of *Ex parte Wynch(d)*, both by Lord Chancellor Cranworth and Lord Justice Turner; the former of whom, explaining the ratio decidendi in that and some other cases, says(e)—"In these cases the principle on which the Court went was this: that technical words were used, which in the opinion of the Court indicated the clear meaning on the part of the testator that the property should go in a course of devolution till there was an exhaustion of the heirs of the body [or as Lord Justice Turner puts it, "the technical words 'heir male' and 'heirs of the body,' importing inheritance from the ancestor"(f).], and as that of course could not be carried into effect, they gave an absolute interest."

(a) 29 L. J. Ch. 863.
(b) 6 Beav. 266.
(c) 3 Mer. 176.
(d) 5 D. M. & G. 206-7.
(e) 2 D. M. & G. 188.
(f) 5 D. M. & G. 224.

Here in like manner, technical words importing inheritance from the ancestor, and indicating very clearly to us the testator's intention that the property should go in a course of devolution to the heirs of the children *ad infinitum*, are used by him, and in our judgment the result must be the same. 1862. *Sept.* 18, *Oct.* 1.

NOTE.—The rule in *Wild's Case*, it is said, does not apply to bequests of personalty; *Buffar* v. *Bradford* 2 Atk. 220: *Stone* v. *Maule* 2 Sim. 490; *Heron* v. *Stokes*, 2 Dr. & War. 89; 12 Cl. & Fin. 161; *Audsley* v. *Horn* 26 Beav. 195 and on appeal 6 Jur. N. S. 205, 29 L. J. Ch. 201. In most cases, however, it matters little whether it does or not; for the parent would be solely entitled; he being the only existing object at the time of distribution, and the absolute interest in personalty passing without words of limitation; *Cape* v. *Cape* 2 Y. & C. 543. But where an *annuity* is given without words of limitation, the annuitant takes only for life: *Savery* v. *Dyer* Amb. 139; *Yates* v. *Maddan* 3 Mac. & G. 532 (this rule is not altered by the Wills Act, 1 Vict. c. 26 = Indian Act XXV of 1838, *Nichols* v. *Hawkes* 10 Hare 342), and if the rule in *Wild's Case* applied, the limitation to children would create a conditional fee: *Stafford* v. *Buckley* 2 Ves. 170,—a personal annuity not being entailable. 2 Jarm. Wills, 3d ed. 373.

That the word 'heirs' in par. 6 of the will meant 'heirs at law' and not 'next of kin,' see *De Beauvoir* v. *De Beauvoir* 3 H. L. Ca. 524, 527 per Lord St. Leonards, and *Re Rootes* cited *supra*. *Evans* v. *Salt*, *contra*, was disapproved of by Lord St. Leonards, 3 H. L. Ca. 556. But see *Low* v. *Smith* 2 Jur. N. S. 344.

Appellate Jurisdiction (a)

Special Appeal No. 351 *of* 1862.

KAMALA' NA'YAK....................*Appellant.*
RAṄGA' RAU........................*Respondent.*

A, a zamíndár, granted lands on kaul to B. B assigned to C, but the lands being mostly in the hands of cultivators, C only occupied those that had been in B's possession. The kist fell into arrear and A attached property of C's. Notice of the attachment was given before, but the property was not seized till after the whole of the arrears claimed had become due. C resisted A's claim on the ground, substantially, that the sum demanded included arrears which had accrued on the lands not occupied by him:

Held, that as to the lands of which C had obtained the actual possession, there was such a privity between A and C as gave A a right to realize the amount of kist outstanding in respect of those lands.

Held also that this right was not affected by failure to prove the execution of a muchalká by C to A, or by the omission to furnish C with a list of the property attached.

Held also that the attachment was not vitiated by the circumstance that notice of the attachment was given before a portion of the arrears claimed had become due.

1862. *October* 6. *S. A. No.* 851 *of* 1862.

THIS was a special appeal from the decree of R. Cotton, the Civil Judge of Madura, in Appeal Suit No. 218 of 1861.

Mayne for the appellant, the defendant.

The facts of the case sufficiently appear from the judgment of the Court, which was delivered by

SCOTLAND, C. J.:—This special appeal has arisen on the confirmation in appeal by the Civil Judge of Madura of a decision passed by the Sub-Collector of that district, under the revenue regulations.

The Zamíndár of Ámmánáyakanur, the plaintiff before the Sub-Collector, appears to have granted three villages of the zamíndárí on kaul to Mr. Fondclair, who sub-let them to the defendant Raṅgá Rau, and afterwards empowered the Zamíndár to make what arrangement he pleased with the defendant. The evidence seems to have been insufficient to establish that a muchalká was executed by the defendant, and there appears nothing to disprove the defendant's statement that the lands assigned to him were in the occupancy

(a) Present Scotland, C. J. and Phillips, J.

of the cultivating ryots, and that he had been able to take up only those which had been in the actual possession of Mr. Fondclair. These, the defendant admitted, were liable to a revenue demand on the part of the plaintiff the Zamíndár, of rupees 236, to which extent he acknowledged his responsibility to the plaintiff. The latter, however, on the strength of the muchalká alleged by him to have been executed by the defendant, but of which there appears to have been no sufficient evidence, attached property exceeding in value the arrear which the defendant admitted to be due to the plaintiff.

Against this proceeding of the Zamíndár, the defendant sought the intervention of the Sub-Collector, on the ground—(1) that he owed the Zamíndár only rupees 236; (2) that neither notice nor demand had been served on him; and (3) that he had not been furnished with a list of the property attached.

The Sub-Collector gives no decided opinion as to the execution of the muchalká in point of fact, but proceeds to declare that it is illegal and invalid by reason of the omission in its preparation of certain of the requirements specified in section V, Regulation XXX of 1802; and he further decides that the attachment itself was illegal, as the demand for the kist which led to the attachment was made before it fell due. He therefore ordered the release of the property belonging to Ranga Rau which had been attached.

The plaintiff appealed, urging among other reasons, that though notice of the attachment had been given *before*, yet, that the defendant's property had not been seized until *after* the rent had become due.

The Civil Judge after observing that as Mr. Fondclair was lessee and paṭṭa-holder, the Zamíndár was justified in sequestering property belonging only to him, and that process should have been issued against the lands only of the renter, seems to have been of opinion that no such privity existed between the plaintiff and the defendant as entitled the plaintiff to enforce any part of his claim, and further that the attachment was invalid on the legal grounds taken by the Sub-Collector.

1862. October 6. S. A. No. 351 of 1862.

We are unable to adopt the view of the Zamíndár's claim and the attachment which the lower courts have taken. We observe that the defendant was content to resist the Zamíndár's claim for rent, on the ground, substantially, that the sum demanded from him, embraced arrears which had accrued on lands not placed in his occupancy by his superior renter. And we are of opinion that in regard to those lands, of which he had obtained actual possession from Mr. Fondclair, there had been established between Ranga Rau and the Zamíndár, a privity such as gave the latter a right to realize the amount of kists outstanding in respect of those lands notwithstanding either the failure to prove the execution of a muchalká by the defendant to the plaintiff, or the objection taken to it on the ground of informality. We do not consider that the fact of a notice of arrears of rent having reached the sub-renter shortly before a portion of those arrears fell due, is sufficient in this case to vitiate the attachment which was put in force only when the entire amount of arrears claimed, had become due and payable.

We therefore reverse the judgments of the courts below, and adjudge as payable by the defendant to the plaintiff, a sum of rupees 236, and declare that to the extent of enforcing the payment of that amount the attachment is valid.

The costs of the proceedings before the Sub-Collector will be borne by the plaintiff, and each party will bear his own costs of the appeals to the Civil Court and to this Court.

Appeal allowed.

Appellate Jurisdiction (a)

Referred Case No. 2 *of* 1862.

MUTTIYA' PILLAI *against* WESTERN.

The fourth section of the Statute of Frauds applies to cases in which the defendant alone is a British-born subject.

1862. *October* 10. *R. C. No.* 2 *of* 1862.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore, under Act XLII of 1860, section 13.

The plaintiff sued the defendant for moneys due on account of goods sold and delivered to one MacFarland, which moneys the defendant promised to pay. The defendant pleaded non-assumpsit, and it appeared that his promise was not in writing. The plaintiff was a Hindú, the defendant a British-born subject, and the Court of Small Causes dismissed the suit, subject to the opinion of the High Court as to whether the Statute of Frauds applied.

No counsel were instructed.

The judgment of the Court was delivered by

SCOTLAND, C. J.:—The question referred for the opinion of the High Court is whether the Statute of Frauds is applicable only to cases where both parties are European British subjects, or also to those in which the defendant alone is such ?

The defendant being a British-born subject, the question of the validity of the alleged contract must, we think, be governed by English law as in force here; and, under the fourth section of the Statute of Frauds, it was necessary that the promise of the defendant to pay the debt of MacFarland, his brother-in-law, should have been in writing.

NOTE.—A Hindú defendant cannot rely on the Statute of Frauds, though the plaintiff is a British-born subject: *Borrowdaile* v. *Chainsook Buxyram*, 1 Ind. Jur. 71. That Statute (29 Car. II. c. 3) was introduced into India under the Charter of 1726.

(a) Present Scotland, C. J. and Phillips, J.

Appellate Jurisdiction (a)

Regular Appeal No. 1 *of* 1862.

RAṄGÁSVA'MI AYYAṄGA'R.............*Appellant.*

VAÑJULATA'MMA'Ḷ and others.........*Respondents.*

A sale by a Hindú widow of land inherited by her from her husband is valid only when made of necessity, and for certain purposes; but on this point, where the plaintiff in a suit to set aside such a sale, has relied in the Court below solely on the ground that the land had been devised inconsistently with the exercise of the widow's power of sale, the Appellate Court will be satisfied with evidence less complete and positive than would otherwise have been required.

1862. *October* 18. *R. A. No.* 1 *of* 1862.

THIS was a regular appeal from the decree of E. W. Bird, the Acting Civil Judge of Negapatam, dismissing the Original Suit No. 2 of 1860, which was brought for the recovery of certain málguzárí lands valued at rupees 13,816-11-5.

Branson for the appellant, the plaintiff.

Saḍagópáchárlu for the respondent, the first defendant.

The facts of the case sufficiently appear from the following judgment.

The plaintiff sued as the adopted son of one Aravamudayyaṅgár, who died in 1843, for the recovery of the village of Cheṭṭipáḷam, which formed part of the estate of the deceased. The plaintiff rested his case on the ground that in 1845, during his minority, the second and third defendants, the widows of the deceased, had illegally sold the village to Annávayyaṅgár, the father-in-law of the first defendant.

The Acting Civil Judge was of opinion that the sale in question had been made boná fide for the liquidation of family debts, and that the plaintiff himself on attaining his majority had ratified the sale by a deed of release, dated the 29th August 1857, and marked No. 1. The Acting Civil Judge accordingly dismissed the suit with costs.

The plaintiff has now appealed against this decision.

We observe that in his original plaint the plaintiff contested the sale in favour of the vendee Annávay-

(a) Present Phillips and Frere, J J.

yaṅgár, who is now represented by the first defendant, 1862. October 18.
solely on the ground that by a will executed by the deceas- R. A. No. 1
ed Aravamudayyaṅgar, the adoptive father of the plaintiff, of 1862.
the village in question had been specifically allotted for charitable purposes. It being apparent, however, that no legal act of endowment had taken place, and that the case must therefore be governed by the rules of Hindú law, the counsel for the plaintiff, on the hearing before the High Court, virtually abandoned this ground as untenable, and rested his case chiefly on the argument that by Hindú law no such sale by the widow is good and valid unless executed under the pressure of necessity and for certain specified purposes. We fully recognize the correctness of this rule, but are at the same time of opinion that we may justly and reasonably be satisfied with less complete and positive evidence on this point than would have been required from the first defendant, if this ground had been taken by the plaintiff in the first instance. Adverting to the fact that the sale was not originally disputed on this ground, we think that the first defendant has adduced sufficient proof to show that the sale was made bonâ fide for the payment of debts, and for the benefit of the general estate, as asserted by the first defendant.

BIBL. COD. COLL. OXON.

With respect to the deed of release No. I, which was signed by the plaintiff on coming of age, it is to be remarked that in this document, which purports to be a receipt for the family-estate then delivered to the plaintiff, the names of the villages then constituting the estate, seven in number, are distinctly specified, and it is patent on the face of the document that the village now in dispute is omitted from the list. The plaintiff in this document further expresses himself fully satisfied with the mode in which the estate had been managed during his minority, and ratifies the acts of the executors. He must therefore be taken to have distinctly assented to the alienation of the village in question. We consequently affirm the decree of the Acting Civil Judge, and dismiss this appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Criminal Petition, No. 69 *of* 1862.

THE QUEEN *against* SUBBANNA GAUNDAN and others.

To constitute the offence of preferring a false charge, under sec. 211 of the Penal Code, the charge need not be made before a magistrate. Nor need the charge have been fully heard and dismissed: it is enough if it is not pending at the time of trial.

1862. *October* 27. *Crim. P. No.* 69 *of* 1862.

THE petitioners were convicted under section 211 of the Penal Code (Act XIV of 1860), by S. N. Ward, the Sessions Judge of Coimbatore, for falsely charging the prosecutor with having committed the offence of highway robbery, knowing that there was no just or lawful ground for such charge. The charge had been preferred before an inspector of police, who disbelieved and refused to act upon it.

Section 211 of the Penal Code enacts that "whoever with intent to cause injury to any person, institutes, or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished" as therein mentioned.

Branson for the petitioners. The conviction was wrong, for, first, it did not appear that the charge was made before a magistrate, and, secondly, it did not appear that the charge was finally disposed of in the prosecutor's favour, and this it would be necessary for the plaintiff to prove in the case of an action for a malicious prosecution.

SCOTLAND, C. J.:—To constitute the offence of preferring a false charge contemplated in section 211 of the Penal Code, it is not necessary that the charge should be before a magistrate. It is enough if it appear, as it does in the present case, that the charge was deliberately made before an officer of police, with a view to its being brought before a magistrate. Of course a mere random conversation or remark would not amount to a charge. As to the other point it is said that it must appear that the charge was

(a) Present Scotland C. J. and Phillips, J.

fully heard and dismissed. That is not necessary. It is enough in a case like the present if it appear that the charge is not still pending. An indictment for falsely charging could not be sustained if the accusation were entertained and still remained under proper legal enquiry. Here the facts that the inspector of police refused to act upon the charge, and that no further step was taken, are enough to bring the case within section 211. 1862. *October* 27. *Crim. P. No.* 69 *of* 1862.

PHILLIPS, J. concurred.

Conviction affirmed.

Original Jurisdiction (a)

Criminal Case Reserved.

THE QUEEN *against* WILLANS.

An indictment for cheating, under sections 415 and 420 of the Penal Code, should state that the property obtained was the property of the person defrauded. But

An indictment defective in this respect is defective for uncertainty and must be objected to, if at all, before the jury is sworn.

Semble the latter part of section 41 of Act XVIII of 1862, only gives power to amend where the defect is formal.

CASE stated by Scotland, C. J. 1862. *October* 30.

"The prisoner, William Russell Willans, was tried and convicted before me of the offence of cheating under sections 415 and 420 of the Indian Penal Code. The indictment charged the offence to be by falsely pretending to the prosecutor Abdulla Sáhib that a certain order drawn by the said William Russell Willans, otherwise called William Russell, on the manager of the Oriental Bank of Madras was a valuable security for the payment of money, and that the prisoner thereby deceived the said Abdulla Sáhib, and fraudulently induced him to pay the sum of two hundred and ninety-two rupees and eight annas to him the said William Russell Willans, otherwise called William Russell, in exchange for the said order, in consequence of which the said Abdulla Sáhib suffered damage in his property: Whereas in truth and in fact the said order was not a valuable security

(a) Present Scotland, C. J. and Bittleston, J.

1862. October 30.

for the payment of money, and the said William Russell Willans, otherwise called William Russell, had no funds in the said Oriental Bank at the time he drew and delivered such order, or at the time of the presentation for payment of the said order, or at any time between the said dates, as he the said William Russell Willans, otherwise called William Russell, well knew, and that he has thereby committed an offence punishable under section 420 of the Penal Code.

" At the close of the case for the prosecution, it was objected by the counsel for the prisoner that the indictment contained no allegation that the money which it was alleged the prisoner had by deceit fraudulently induced the prosecutor Abdulla Sáhib, to pay to him, the prisoner, was the property of the said Abdulla Sáhib: that this allegation was as necessary and material in an indictment for cheating under the Penal Code, as it was before the Code came into operation; and that the indictment therefore was wholly defective and bad. I entertained doubts upon the point, and declined to express any opinion at the time; but as the evidence fully proved that the money was the property of the prosecutor, I decided that the indictment should be considered as amended so as to meet the objection, if I had the power to amend. The case was afterwards left to the jury, and they found the prisoner guilty; and I passed upon him a sentence of five months' rigorous imprisonment, reserving for the consideration and judgment of the High Court, first, the validity of the objection taken, and, secondly, if the objection was valid, whether I had power to amend the indictment."

Branson for the prisoner, argued that it was necessary to allege the property obtained to be that of the prosecutor. He cited *Reg.* v. *Norton*(a), *Martin* v. *The Queen*(b), *Reg.* v. *Parker*(c), *Reg.* v. *Marsh*(d).

BITTLESTON, J. referred to *Reg.* v. *Sill*(e).

Branson. That case decides that the omission to state whose property the money obtained was, is not a formal

(a) 8 C. & P. 196.
(b) 3 Nev. & P. 472.
(c) 2 Gale & Dav. 709.
(d) 1 Den. C. C. 505.
(e) 22 L. J. M. C. 41, S. C.

defect such as will be cured by 14 and 15 Vict. c. 100, sec. 25 from which sec. 22 of the Indian Act XVI of 1852 is copied. 1862. October 30.

BITTLESTON, J.:—The later Act XVIII of 1862 contains an important addition. Section 41 enacts that "Every objection to any indictment *for uncertainty*, or for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards." Is not your objection as to matter of uncertainty?

Branson. The Act must mean uncertainty arising from matter alleged. It cannot mean uncertainty from matter not alleged, for if so an indictment need only charge that the prisoner committed theft or murder, and it might be urged that it was merely objectionable for uncertainty, and therefore not bad in arrest of judgment.

Every thing shall be presumed against the pleader; and accordingly, as it is not alleged here that the money was the money of the prosecutor, we must presume that the money was not his. If so there is no uncertainty. Then as to amendment, there was no variance, and therefore Act XVIII of 1862, sec. 1, does not apply.

SCOTLAND, C. J.:—I am of opinion that upon the construction which it seems to me must be put on Act XVIII of 1862, sec. 41, the objection now taken is not fatal to the indictment.

We must first see how the law stood before that Act was passed, and then consider whether the objection is not met by the enactment in section 41.

The indictment charges that the prisoner, by pretending that the order therein mentioned was a valuable security, deceived the prosecutor, and fraudulently induced him to pay rupees 292-8-0 to the prisoner in exchange for such order, in consequence of which the prosecutor suffered damage in his property. Now the 415th section of the Penal Code declares that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person......is said to "cheat." Reading the indictment with this section alone I should not have hesitated to come to the conclusion that

1862. October 30.

it was a good indictment. To constitute the offence of cheating, it would seem, from the wording of the Code, to be enough to allege that the property obtained was in the possession of the person defrauded, and that it is not necessary to allege that such property belonged to him. And even if this were not so, when I find it alleged in the indictment that the prisoner deceived the prosecutor by the false pretence therein stated, and fraudulently induced him to pay the money, and that in consequence of such payment the prosecutor suffered damage in his property, I should, but for the cases cited, have not hesitated to say that this amounted to a sufficient statement that the money belonged to the prosecutor.

There has, however, been a series of cases, commencing with *Reg.* v. *Norton* and ending with *Reg.* v. *Sill*, which decide that in indictments for obtaining money by false pretences and for a conspiracy to cheat, you must state whose the property was. We must see, then, what is the ground of the decisions in those cases, and it seems to me that they rest on the ground of uncertainty as to the offence alleged. Lord Denman and Patteson, J., in *Martin* v. *The Queen*(a), say that, notwithstanding the introduction of the word " feloniously," it is consistent with the allegation in the indictment that the property may have been the prisoner's own property and the decision in this and the following cases of *Reg.* v. *Parker* and *Reg.* v. *Marsh* was that the indictment was defective for uncertainty.

Then *Reg.* v. *Sill* shews how these cases have been dealt with. There the indictment did not allege that the property was the property of the prisoner, and the objection was taken on a writ of error. Lord Campbell, C. J. in giving judgment says " I am reluctantly compelled to give effect to this objection. It is admitted that before the 14 & 15 Vict. c. 100 it was necessary in such an indictment as this to state in whom the property or the money was. Whether I should have entirely concurred in these decisions is another matter. Possibly I should have thought that no injustice would be done by omitting that statement, but I feel myself bound by those solemn decisions." Then

(a) 3 Nev. and P. 472.

as to whether the law had been altered in this respect by the 14 & 15 Vict. c. 100, he says: "But I think that this is not a formal defect, because the allegation as to the ownership of the property is one which must be proved as alleged," and concludes "I will, however, express a hope that the legislature in its wisdom will on the first opportunity alter this nicety, which appears to me to be in reality not material to the guilt or innocence of the party accused." Coleridge, J. observes: "I think therefore that in spite of sec. 8(*a*) it is still necessary to state the ownership of the property obtained by false pretences, and that the omission is not merely formal, such as is cured after verdict by sec. 25." And Wightman, J. says: "It is agreed that the question before us arises under the 14 & 15 Vict. c. 100. Without that statute we should be bound by the previous decisions, although it is possible that if the question were still open, we might now decide differently." He then refers to sec. 8(*a*), and continues: "It seemed to me a question of some doubt, which I still feel, whether this does not also make the indictment sufficient without a statement that the money obtained is the property of any particular person. No doubt it must appear in the course of the proceeding that it belonged to somebody, otherwise there would be no intent to defraud anybody. However, after the decisions which have been referred to, I must consider that this allegation is not included in the statement of an intent to defraud, and I therefore concur with the rest of the Court."

Now, whilst *Reg.* v. *Sill* confirms the former decisions, it is clear that the Judges do not go entirely with the ground upon which those decisions rest. They felt themselves bound by authority, and acted accordingly. We in the same way bow to the decisions in question, confirmed as they are by the last, which was a solemn proceeding on a writ of error; and are thus brought to a similar question in effect to that before the Queen's Bench in *Reg.* v. *Sill,* viz. whether section 41 of Act XVIII of 1862 precludes the defendant's counsel from succeeding on the objection?

The question is, do the words in the section "for uncer-

(*a*) This provides that it shall be sufficient to state that the defendant did the act with intent to defraud, without alleging the intent to defraud any particular person.

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tainty" extend to objections other than formal? It seems impossible to read this section 41 and say that the words "for uncertainty" introduced before the words "or any formal defect," do not apply to objections for other than formal defects. These words "for uncertainty" do not occur in the former Indian Act XVI of 1852, and in every other respect the provision in this section is the same in both acts, and we find them introduced into an Act passed after the decision of the cases cited. If then the words "for uncertainty" apply, as I think they do, to defects of a substantial character, as distinguished from mere formal defects, the question is, is not the present an objection for uncertainty? There can be no doubt that it is. The allegations of the indictment are consistent with the property being that of the prosecutor. But they may also be said not to be inconsistent with the property being that of another. I am therefore of opinion that the section applies, although the objection is not for a mere formal defect.

It was said that upon this construction hardly anything need be stated in an indictment, unless the objection be taken before the jury is sworn. But cases may arise where the prisoner may be at liberty to move the Court in arrest of judgment—for instance, the only construction to be put on the indictment may show that it alleges no offence in law, and yet, this defect not having been pointed out before the jury are sworn, the case may have gone on and the evidence proved an offence of which the defendant may have been convicted. I think that in such a case the prisoner would be entitled to move in arrest of judgment, not on the ground of the indictment being bad for uncertainty, but because it charged no offence(a). When the objection is on the ground of uncertainty, the Act XVIII of 1862, works no real hardship or injustice in requiring the prisoner to demur or move to quash the indictment. If the indictment is got rid of by such demurrer or motion, the prisoner cannot plead this in answer to a second indictment; and if, on the other hand, he does not take the objection, and the case is

(a) And even though the defendant himself omit to move in arrest of judgment, the Court, if satisfied that the prisoner has not been found guilty of any offence in law, will of itself arrest the judgment, 1 East 146. But the judgment of acquittal thereupon given will be no bar to a fresh indictment.

tried, the evidence will get rid of all uncertainty and he cannot complain if his offence is proved. The provision contained in section 41 I consider very beneficial.

As to the second point,—whether the Court could have amended?—as it is not necessary to answer the question, any thing I now say must be considered merely *obiter dictum.* But it certainly seems that the latter part of section 41 only gives power to amend when the defect is formal. The power may for good reasons have been advisedly so confined.

BITTLESTON, J.:—I am of the same opinion. The only question is whether the objection is one for uncertainty. If it is, then it was taken too late, and the prisoner cannot now have the benefit of it.

The indictment is defective. On that point we are bound by *Reg.* v. *Sill.* To be perfect, this indictment should have contained a clear allegation that the property was the property of the prosecutor. That rule was derived from times when great strictness was required in pleading. A statement of the ownership of the property was only required to give certainty to the description of the offence; and the cases all go on the ground that the omission of such statement causes uncertainty as to the offence, and thereby creates a difficulty in pleading *auterfois convict* or *auterfois acquit* in bar to a subsequent indictment for larceny in respect of the same transaction. *Reg.* v. *Martin(a)* per Lord Denman.

The allegations in this indictment leave it uncertain whether or not the property belonged to the prosecutor. They do no more than that. They cannot be taken, as Mr. Branson puts it, to negative that the property was the prosecutor's. The indictment is insufficient by leaving the ownership uncertain, but it is not bad by alleging that the money was not the prosecutor's property. It comes accordingly within section 41. I do not see how we can limit this section by confining its application to formal defects. The subsequent part of the section makes a distinction as to what the Court may do, or is to do, when the objection is taken in time. If the objection is on the ground

(a) 8 A. & E. 481.

1862. October 30. of uncertainty being other than a formal defect, the Court has no power to amend. If it is for a formal defect, or an uncertainty merely amounting to such, then the Court may amend.

If Stat. 14 & 15 Vict. c. 100, s. 25 had contained these words which are inserted in the Indian Act, the judgment in *Reg.* v. *Sill* would certainly have been in favour of a conviction.

Conviction affirmed.

NOTE.—The allegation that the money, etc. obtained was the property of the person whom it was intended to defraud is expressly declared to be unnecessary by Stat. 24 and 25 Vict. c. 96, s. 88.

Original Jurisdiction (a)

Criminal Case Reserved.

THE QUEEN *against* 'AIDRU'S SA'HIB.

The materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence in a judicial proceeding; and an indictment under sections 191, 193 of the Penal Code, though it does not allege materiality, is good if it alleges sufficiently the substance of the offence.

1862. October 30. CASE stated by Scotland, C. J.

"The prisoner 'Aidrús Sáhib was tried and convicted before me of the offence of intentionally giving false evidence in a judicial proceeding under sections 191 and 193 of the Indian Penal Code. The indictment charged that the prisoner on the 25th day of September 1862 at Madras, "while being examined as a witness in a judicial proceeding then and there pending before the Honourable Sir Colley Harman Scotland, Knight, Chief Justice, and the Honourable Sir Adam Bittleston, Knight, Puisne Justice of the High Court

(a) Present Scotland, C. J. and Bittleston, J.

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of Judicature at Madras and Judges of the said High Court, and being legally bound by an oath to state the truth, intentionally gave false evidence, by falsely stating that he the said 'Aidrús Sáhib, otherwise called Ḳádar Masṭán Sáhib, did not sign the exhibits produced at the trial of the action of J. H. Mollow and others against the said 'Aidrús Sáhib, otherwise called Ḳádar Masṭán Sáhib, and marked respectively A, B, C and E, he the said 'Aidrús Sáhib, otherwise called Ḳádar Masṭán Sáhib, at the time he made the said statement, well knowing the same to be false: Whereas in truth and in fact the said 'Aidrús Sáhib, otherwise called Ḳádar Masṭán Sáhib, had signed the said exhibits, and that he has thereby committed an offence punishable under section 198 of the Penal Code."

"At the close of the case for the prosecution it was objected by the counsel for the prisoner that the indictment was wholly defective and bad on the several following grounds.

"First. That the indictment did not allege before whom or what Court the oath by which the prisoner was legally bound to state the truth was taken, and that it was consistent with the allegations in the indictment that the oath was not taken before a court of justice or a judge.

"Secondly. That the indictment did not sufficiently allege that the oath was taken by the prisoner as a witness in a judicial proceeding and upon and during the trial stated in the indictment.

"Thirdly. That the indictment did not allege or show that the false statement made by the prisoner was material to the matter of the judicial proceeding in which such statement was made.

"I expressed no opinion upon the points, and the case being afterwards left to the jury, they found the prisoner guilty, and I passed upon him a sentence of seven years' transportation, reserving the above objections for the consideration and judgment of the High Court."

Branson for the prisoner.

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1. The indictment merely alleges that the prisoner being legally bound by an oath to state the truth intentionally gave false evidence. It is consistent with the allegation that the prisoner was never sworn before a court of justice or a judge. The word "oath," according to the Penal Code, section 51, includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a court of justice or not.

2. The indictment does not state that the prisoner was sworn in any judicial proceeding. Neither does it state that the judicial proceeding therein mentioned was the trial of the action of *Mollow* v. *'Aidrús Sáhib.* In *Reg.* v. *Bartholomew(a)* Alderson B. held an indictment for perjury insufficient, as it did not clearly and distinctly charge the prisoner with taking a false oath in a matter stated to be in judgment before a Court, or a person having competent authority to decide it. See too *Reg.* v. *Overton(b)* per Lord Denman.

3. There is no averment of the materiality of the false statement, *Reg.* v. *Nicholl(c), Reg.* v. *Murray(d), Reg.* v. *Bignold(e).*

Bittleston J. referred to *Reg.* v. *Edward Gibbons.(f)*

Scotland, C. J. :—Without at all desiring to encourage that which is very objectionable, undue laxity in the framing of indictments, I have come to the conclusion that the objections cannot be sustained. The provision in section 191 of the Penal Code as to the offence of "giving false evidence," is quite new; and the legislature seems clearly to have intended that it should be so in essentials as well as in name. Perjury, on the other hand, by the law of England is an offence to which statutes and decisions have attached very strict requirements; and it cannot now be contended that everything necessary to the charge of perjury must appear in an indictment for the offence of giving false evidence.

(a) 1 Car. & K. 366.
(b) 4 Q. B. 90.
(c) 1 B. & Ad. 21.
(d) 1 F. & F. 80.
(e) Cited in 2 Russ. by Greaves, 639.
(f) 8 Jur. N. S. 159.

We have here to seq what is the offence provided against by the Penal Code. Section 193 enacts that "whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished," as therein mentioned. Section 191 of the same Code defines the giving false evidence as follows: "Whoever being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." We nowhere find anything said as to the subject-matter of the statement being material to the result of the proceeding in which that statement is made; and without allowing myself to be unduly influenced by what appears in the edition of the Penal Code published before it became law, I may observe that in that edition the word "material" occurs in section 188, which corresponds with section 191 above quoted. Again, looking to section 196 of the Code in force we find it provided that "whoever corruptly uses or attempts to use as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave false evidence." And then turning to section 192 for the definition of the crime of fabricating false evidence, we find the word "material" introduced *(a)* as is also the case in several other sections in the same chapter.

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We may therefore fairly infer that the framers of the Code used the word "material," where it was intended to be an essential of the offence, and advisedly omitted it when such was not their intention; and it must be taken that they were familiar with the statutes and decisions relating to perjury, and knew that materiality was required to be not only proved but alleged. We find, then, they omit the word

(*a*) Section 192 enacts that "whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion *touching any point material to the result* of such proceeding, is said 'to fabricate false evidence."'

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"material" in sections 191 and 193 as to the offence of giving false evidence, though they insert it in sec. 192 as to the offence of fabricating false evidence. We must therefore presume that they did not consider it essential to allege in an indictment for giving false evidence that the prisoner swore that which was material to the result of the proceeding. All the cases shew how hard it is to say what is material and what is immaterial, when the examination goes to the credit of a witness. This fact, too, may have been present to the minds of the framers of the Code, and conduced to their determination that materiality need not be alleged in indictments for giving false evidence. I do not say that the question of materiality may not be matter for the consideration of the jury. For the giving false evidence, to come within section 193, must be an intentional giving; and in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner.

The materiality, then, of the subject-matter of the statement is not a substantial part of the offence of giving false evidence: this indictment, though it omits the allegation of such materiality, alleges the substance of the offence: it is therefore sufficient under Act XVIII of 1862, sec. 24.

So much as to the third objection. As to the first, viz. that the indictment does not shew before what court the oath was taken, it seems to me that, reading the whole together, the indictment admits of no reasonable doubt on the subject. I think, however, that the mode of allegation by the present participle ("while being examined," "being legally bound"), which the framer of the indictment adopted, had better not be followed. But taking it altogether the indictment refers to one time and one place, and sufficiently alleges that the prisoner was at that time and place under the legal obligation of an oath.

The second objection resembles the first. It is that the indictment did not sufficiently allege that the oath was taken by the prisoner as a witness in a judicial proceeding, and upon and during the trial stated on such indictment. But

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it states positively that on September 25th, 1862, at Madras, the prisoner, whilst being examined as a witness in a judicial proceeding then and there pending, and being legally bound by an oath to state the truth, intentionally gave false evidence. With this before one it is impossible to say that the oath was not taken in that very judicial proceeding then pending. No doubt there is nothing to show that this judicial proceeding was the trial of the action of *Mollow* v. *'Aidrús Sáhib.* But the indictment must be regarded as sufficiently charging that the oath was taken and the false evidence given in a judicial proceeding then before the Court; and any objection on the ground of uncertainty is disposed of by our decision in *Reg.* v. *Willans.*

BITTLESTON, J.:—I also think that these objections are not sustainable, and that the conviction must be affirmed. The indictment, certainly, contains no averment that the prisoner's statement was material. But we cannot infer that such statement was immaterial. The indictment simply omits all allegation as to materiality. Now, according to the English law it was necessary to aver that the subject of the false statement was material to the result of the enquiry. This was because the definition of perjury involved the element of materiality. But the definition in the Penal Code of the offence of giving false evidence omits the requisite that the false statement must refer to a subject material to the result of the judicial proceeding. And it seems to me that an indictment founded on this Code cannot be held bad because it makes a similar omission.

I entertain no doubt that the word "material" was advisedly omitted in section 191 and 193 of the Penal Code. In sections 192, 197, 198, 199 and 200, which refer respectively to the fabrication of false evidence, to the issuing or signing a false certificate, to the using as a true certificate one known to be false, to false statements made in declarations receivable in evidence, and to the using as true any such declaration known to be false, we find the word "material" introduced. When we see a distinction thus established between the offence referred to in sections 191, 193 and the other offences just mentioned, it is clear that the legislature advisedly left out materiality as an element essential to constitute the offence of giving false evidence in a judicial proceeding.

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Their reasons for so doing were probably, first, that it may fairly be presumed that a Court will not suffer witnesses to give evidence on matters which have no bearing on the result of the proceeding before it, and, secondly, that it is difficult to say that any statement made during that proceeding may not have some appreciable influence on the result.

I have therefore no doubt that the averment of materiality is no longer necessary in an indictment for giving false evidence. Of course I am far from saying that materiality may not often have to be proved. It will be hard to convict a prisoner if the subject-matter of his statement appear to have been so immaterial as to leave it doubtful whether his falsehood could have been intentional. But that is not the point here.

As to the first and second objections, I think the indictment when reasonably read amounts to this: that the prisoner, when being examined as a witness in a judicial proceeding before this Court, swore falsely, being then legally bound by an oath to state the truth. And though, no doubt, it is left uncertain whether that judicial proceeding was the action of *Mollow* v. *'Aidrús Sáhib,* there is the allegation that he intentionally gave false evidence while being examined as a witness in a judicial proceeding. As all the objections fail, the conviction must be affirmed.

SCOTLAND, C. J. :—I may add that the occurrence of the word "material" in sections 197, 198, 199 and 200 confirms my opinion already expressed. The distinction appears to be this. When the act giving rise to the indictment occurs out of Court, then materiality is made essential to the offence, and must accordingly be averred in the indictment. But when the act occurs in the face of the Court, then materiality is not made essential, and need not therefore be averred.

Conviction affirmed.

Appellate Jurisdiction (a)

Regular Appeal No. 51 of 1861.

AYYA'VU MUPPANA'R......................*Appellant.*

NI'LA'DATCHI AMMA'L, and others......*Respondents.*

A Hindú whose adoption is invalid is entitled to maintenance in his adopter's family.

A son, whether adopted or begotten, can claim maintenance of his father until put into possession of his share of the ancestral estate.

As against an adopted son suing for his share of the ancestral estate, the law of limitation does not begin to run until the allotment of such share has been demanded and refused.

The share of an adopted son is one-fourth of the share of a son born to the adoptive father after the adoption.

THIS was a regular appeal from the decree of R. G. Clarke, the Civil Judge of Tanjore, in Original Suit No. 1 of 1859. 1862. *November* 1. *R. A. No.* 51 *of* 1861.

Sadagópáchárlu for the appellant, the plaintiff.

Branson for the respondent, the first defendant.

The facts of the case sufficiently appear from the following judgment.

The plaintiff has brought this suit for one-fourth of the estate of Appávu Muppanár, his adoptive father, his share being thus limited from the circumstance that Appávu had, after the adoption, a begotten son of whom the first defendant is the mother and guardian.

The Civil Judge observes that the plaintiff has admitted that at the date of his adoption he was thirty years old and a married man with three children, that the pandits of the late Sadr 'Adálat have declared that an adoption made under such circumstances is invalid, but that the person taken in adoption is entitled to maintenance, and that maintenance accordingly was decreed to the plaintiff in Suit No. 272 of 1829. The Civil Judge holds that such decree disposed of the plaintiff's pretensions to the rights of an adopted son by disallowing the same; and the matter in issue having, according to his view, been thus already adjudicated, he dismissed the suit with costs.

(a) Present Strange and Frere, J J.

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We are unable to agree with the Civil Judge in the view which he has taken of the decree in question, No. 272 of 1829. It is true that a Hindú whose adoption is invalid is entitled to maintenance in the family of his adoptor, but it is also the case that a son, whether adopted or begotten, can claim maintenance of his father so long as he is not put in possession of his individual share in the ancestral property. Suit No. 272 of 1829, preferred by the present plaintiff, was of the latter description, the then first defendant being the plaintiff's aforesaid adoptive father. This suit was met by denial of the adoption, both as to fact and legality. The fact of the adoption was indubitably found in the said decree, and the question is whether the maintenance then awarded to the plaintiff was allotted to him as an adopted son entitled thereto at his father's hands, or as one whose adoption could not be recognized, but who still had to be supported.

The suit was carried on by appeal and special appeal, the original decree being on both occasions affirmed. In none of the judgments is there an expression to show that the maintenance was awarded otherwise than as claimed, namely as what was due by a father to his son.

The judgment of the Muftí Ṣadr Amín sets out with a recital of the evidence on which the plaintiff had relied for the establishment of his adoption, namely that the ceremony of ar′utalikku-táli-kaṭṭu(*a*) (for the re-marriage of widows) prevailed in the caste to which both parties to the suit belonged, that the adoption had been made " according to the conditions laid down for the purpose," that the plaintiff had no male issue, that he had been in management of the affairs of his adopter's family, and that he had not performed his natural father's funeral obsequies. It is true that the Muftí here cites that part of the opinion of the Paṇḍits which declares that the plaintiff is entitled to maintenance, but he seemingly does so to fortify himself in awarding maintenance, as due under any circumstances, and in amount proportionate to the value of the property to be charged. He then shows the sum claimed for maintenance to be a reasonable one, and concludes by awarding it.

(*a*) From அறுதலி 'widow' தாலி 'a piece of gold tied on a bride's neck by the bridegroom,' and கட்டு 'a tie.'

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It is to be regretted that the Muftí Ṣadr Amín was not more explicit in stating the grounds on which the maintenance was allowed by him. But taking into account the terms of the plaint wherein it was claimed as due from father to son, and the nature of the defence wherein the sonship was denied, together with the absence of any recognition in the judgment that the defence in any respect had been made good, we cannot doubt that the Muftí's award was a decree in the plaintiff's favour according to the terms of the plaint.

We are confirmed in this opinion by what appears on the continuance of the suit in appeal and special appeal.

In each instance the appellant was the then first defendant, namely the plaintiff's adoptive father, and the grounds of these appeals were that the adoption was an illegal one, and had nevertheless been recognized. In the appeal-petition, the appellant certainly notices the vagueness of the Muftí's decree on the subject of the validity of the adoption, but he also remarks that it has been "confirmed," or recognized, notwithstanding the declaration of the Paṇḍits against its validity, and he describes the maintenance to have been awarded as "sued for." Nowhere does he attribute to the decree the design of adjudging the maintenance as allotted for the support of one whose adoption had been disallowed. He would, it is obvious, have been but too glad to seize upon the fact of such disallowance could the decree by any possibility have given cover to such an idea. In the special-appeal petition the appellant's view of the decree in appeal is distinct, namely that it recognizes the adoption, but upon improper grounds.

The decree in appeal was given by the Registrar. That officer says that he confirms the fact alone of the adoption, the legality thereof being a matter difficult to pronounce upon because of a conflict of opinion. He indicates however that the adoption seemingly was valid, as the parties were of a class not strictly bound by the requirements of the Hindú law. He concludes by affirming the decree of the Muftí, that is, he concurred in the award of maintenance to the plaintiff as due from father to son. The decree in special appeal by the provincial court is distinct in its terms. Therein the adoption is affirmed on the ground that "an adoption once made is valid and cannot be set aside."

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We have thus not to occupy ourselves with the exceptions taken to the adoption as one that cannot be sustained in law. Whether rightly or wrongly, it is clear to us that the decrees before us have recognized the adoption, and have acted upon it, by awarding to the plaintiff the maintenance he had then claimed as his due as an adopted son, disallowing at the same time the defendant's pleas to the invalidity of the adoption. A matter thus settled cannot be re-opened. The plaintiff must be accepted as the adopted son of Appávu Muppanár, and the only matter which we have to determine is the share in the family estate due to him as such.

The court below has adjudged to the plaintiff the share claimed by him.

It is objected that this claim is barred by the statute of limitation, which, it is contended, began to run from the time when the plaintiff's adoption was disputed, or, failing that plea, from the time that Appávu Muppanár (his adoptive father) died, which was thirteen years before this suit was instituted.

We consider the objection of no force. The previous litigation concerned the plaintiff's status in the family. Once found to be a member of the family, he was entitled to his rights therein. He might either continue therein as a co-sharer, receiving from the common funds what was necessary for his maintenance, or he might claim division and live upon the share devolving upon him. He assuredly was not deprived of his option and required to demand that he should be put upon the footing of a divided member. Nor does the death of his adoptive father alter the circumstances. This could not compel the plaintiff to seek a division. It is only when the allotment of a share is demanded and refused that the statute begins to run against a claim such as the present, and it is not pretended that the bar has been thus incurred.

The particular share awarded to the plaintiff is one-fourth of the estate. It is true that in the Mitákshará (chap. 1, sec. XI, par. 24) the share of an adopted son, where a begotten son springs up, is declared to be a fourth share, but it is explained in the Sarasvati Vilása that this is to amount to a fourth of what the begotten son is to have. That is, the

estate is to be divided into five portions, of which the begotten son is to have four and the adopted son one. The latter gets thus but one-fifth of the whole property. The pandits being in attendance have explained to the Court that such is the law.

1862. November 1. R. A. No. 51 of 1861.

We modify the decree below, and award to the plaintiff one-fifth of the estate in issue as described by him, excepting that portion invested in the name of Veṅkaṭáchalasvámi for charitable purposes, the claim to divide which has been disputed and has now been abandoned by the plaintiff.

The first defendant is to pay all costs throughout.

Appeal allowed.

NOTE.—See further as to the adopted son's share when a legitimate son is born after the adoption: *Dattaka Chandriká*, sec. V, §§ 16, 17: *Dattaka Mímánsá*, sec. V, § 40, sec. X, § 1: Sutherland, Adoption, pp. 230, 242, 243: *Dáya-bhága*, chap. X, § 13: F. W. Macnaghten, *Considerations on the Hindú Law*, 120 1 W. H. Macnaghten, *Principles and Precedents of Hindú Law*, 70; *Srinath Serma* v. *Radhakaunt* 1 S. D. A. Rep. 15: *Dutt Narain Singh* v. *Roghoobeer Singh* ibid. 20: Morton ed. Montr. 394 n., 395 n.

In *Civil Petition No.* 130 *of* 1862, heard 26th July 1862, in the late Madras Sadr Court, where A adopted B, and afterwards a son, C, was born to A, and B and C survived A, and then C died, it was *held* by Strange and Phillips, J J., on reference to the Junior Paṇḍit, that B inherited all the property of A. *Ex relatione* Mr. Mayne.

The following is the hitherto unprinted passage from *Sarasvati Vilása* referred to in the judgment:—Vasishthena: tasmiñçca pratigrhît aurasa utpadyata [leg. utpadyeta?] caturthâñçabhâgî syâddattaka iti. Dattakagrahaṇañ kritakrtrimâdinâm pradarçanârtham putrîkaraṇaviçeshât. Tathâ ca Kâtyâyana: utpanne tvaurase putre caturthâñçaharâḥ sutâh. savarnâ asavarnâstu grâsâcchâdanabhâjanâ iti. Savarnâḥ kshetrajadattakâdayah: ta aurase sati caturthâñçaharâç caturthâñço nâma caturthasya yo'ñçaḥ samatve parikalpyate tattulyo'ñçaḥ pañçamâñça ityarthah: pañçamâñçaharâ dattakrtrimâdisutâḥ punariti smrteh: punariti paççâdutpanna aurasa ityarthah: asavarnâḥ kânînagûdhotpannasahodhapaunarbhavâh.

Per Vasishtha:—"And when there has been an adoption, if a legitimate son be afterwards born, let the given son share a fourth part." The mention of a "given son" is intended for an indication of others also, as the son bought, the son made, and the rest, according to the difference of son-making. Accordingly Kátyáyana: "And when a legitimate son is "born, the [other] sons are takers of a fourth part, [provided they are] "of the same class, and those not of the same class are entitled to main-"tenance."

"Those of the same class," [i. e.] a son raised on a wife, a son given &c., share a fourth part, there being a legitimate son. A fourth part means a portion equal to one fourth of the share [of a legitimate son], that is to say, a fifth share, inasmuch as a smriti declares a son given, a son made &c., to be entitled to one-fifth share in the event of a legitimate son being born afterwards. "Those not of the same class" [i. e.] son of an unmarried girl, son of concealed birth, son of a pregnant bride, and on of a twice-married woman.

The Reporter is informed by Professor Bühler that according to the *Vyávahára Mayúkha* some authorities, in the quotation from Kátyáyana, have "trtîyâñçaharâḥ sutâḥ."

Appellate Jurisdiction (a)

Special Appeal No. 546 *of* 1861.

SIVAPPA'CHA'RI........................*Appellant.*
MAHA'LINGA CHETTI and others...*Respondents.*

The right to conduct a marriage-procession along the public highway can only be questioned by the magistrate; and an action will lie against private persons forcibly stopping such a procession, even, semble, where it is unusual for persons of the plaintiff's caste to conduct one.

1862. *November* 1. *S. A. No.* 546 *of* 1861.

THIS was a special appeal against the decree of Srínivása Rau, the Additional Principal Ṣadr Amín of Mangalúr, in Appeal Suit No. 278 of 1859.

The plaintiff, an artizan beloning to the goldsmith caste, sued for damages on account of the defendants having forcibly stopped a marriage-procession which he was conducting on the public highway. The defendants pleaded, by way of confession and avoidance, that it was not usual for people of the plaintiff's caste to pass along the road (which lay in front of the Padubidre pagoda) "in conveyance and with music," as was the case on the occasion which gave rise to the original suit.

The District Munsif of Kapa adjudged the first and second defendants to pay the plaintiff rupees 47 on account of losses actually sustained, and all the defendants, with the exception of the third, tenth and eleventh, to pay him rupees 30 as personal damages for the obstruction.

The latter sum was disallowed by the Additional Principal Ṣadr Amín, who held that persons of the plaintiff's caste had no right to institute such processions as that in question; and on this ground the plaintiff appealed specially.

Branson for the appellant. The procession was legal, the road being a public one, and the obstruction by the defendants was unjustifiable.

The Court delivered a written judgment, from which the following is an extract:—We do not concur in the opinion of the Principal Ṣadr Amín that the procession was one which the plaintiff was unauthorized to institute. Being

(a) Present Strange and Frere, J J.

conducted by him on the public highway, his right so to make use of the highway could only be questioned by the magistrate, who, for preservation of the peace, might, if he saw sufficient grounds, interdict the procession. The defendants clearly had no such authority.

1862. *November* 1. *S. A. No.* 546 *of* 1861.

We therefore reverse the decree of the Principal Ṣadr Amín and affirm that of the District Munsif, as against the first and second defendants, who will be held liable for all damages awarded to the plaintiff by the decree of the District Munsif. The Principal Ṣadr Amín has absolved the remaining defendants from liability, on the ground that they are not shown to have participated in the acts of the first and second. With this decision on a question of fact we are not called upon to interfere.

The costs in appeal and special appeal are to be paid by the first and second defendants.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 652 *of* 1861.

TA'YUMA'NA REḌḌI..............................*Appellant.*
PERUMA'L REḌḌI and others...............*Respondent.*

A father-in-law, although of the Reḍḍi caste, cannot disinherit his heir in favour of his son-in-law.

Special Appeal No. 89 *of* 1854, affirmed.

1862. *November* 8. *S. A. No.* 652 *of* 1861.

THIS was a special appeal from the decree of T. I. P. Harris, the Civil Judge of Trichinopoly, in Appeal Suit No. 53 of 1861, affirming a decree in favour of the plaintiff by the District Munsif of Tur'aiyúr. The plaint set forth that one Rámaliṅgáchchi Reḍḍi, having no male issue, and having given the plaintiff his only daughter in marriage, had, in accordance with the custom of his caste, executed a deed marked A on the 23rd Vaikási of Kródhí (13th June 1844), by which he conveyed all his property to the plaintiff absolutely : that the plaintiff continued thenceforward to enjoy the property of Rámaliṅgáchchi, and to protect him : that

(a) Present Phillips and Frere, J J.

1862. November 8. S. A. No. 652 of 1861.

Rámalingáchchi died in A'vaṇi of Chittártti (July 1859): that within four days afterwards the defendants, (the first and third of whom were the brothers of the deceased, and the fourth claimed to be his paternal nephew and adopted son) forcibly took away certain jewels, cattle, corn and cotton, of the value of rupees 300, formerly belonging to Rámalingáchchi and comprised in the deed A; and that the suit was instituted to recover that property, and also to obtain a declaration of the plaintiff's right to a certain land valued at rupees 300 and to a 'house-ground' valued at rupees 165, which were also comprised in the same conveyance.

Branson for the appellant, the fourth defendant. The fourth defendant is Ramalingáchchi's nephew and heir: the deed A is invalid; and the alleged custom is not established or admitted: it is, moreover, illegal: *Special Appeal No.* 89 *of* 1859(*a*).

Tirumaláchariyár for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The plaintiff laid claim to the estate of his father-in-law Rámalingáchchi Reḍḍi, who died in 1859, under a deed executed by the latter in 1844, by which he conveyed his property to his son-in-law, the plaintiff.

The fourth defendant, the paternal nephew of the deceased, resisted the plaintiff's claim, on the ground that he, the fourth defendant, had been adopted by the deceased, and was in possession of his property, as his legal heir and representative.

The District Munsif was of opinion that the fourth defendant had failed to prove the adoption in question. He further observed that the plaintiff was allowed to be the son-in-law of the deceased, and that the fourth defendant had admitted the existence among persons of the Reḍḍi (*b*) caste, of the practice of constituting a son-in-law heir to the property of his father-in-law. The District Munsif accordingly passed judgment in favour of the plaintiff, and this decision was confirmed in appeal by the Civil Judge.

(*a*) M. S. D. 1859, p. 250.

(*b*) "The name of the principal caste of Telinga cultivators," Wilson's Glossary.

The fourth defendant preferred a special appeal against this judgment. 1862. November 8. S. A. No. 652 of 1861.

We are satisfied that the decree in this case, being at variance with known and fundamental rules of Hindú law, cannot be sustained. The admission said to have been made by the fourth defendant is no admission of the legality of the practice to which the lower courts have alluded; and that this custom has not the force of law has been expressly declared by the decree of the late Ṣadr Court in Special Appeal No. 89 of 1859, at page 250 of the published decrees for that year.

We are of opinion that independent of the adoption pleaded by the fourth defendant, he is entitled to succeed to the property of his paternal uncle, in preference to the plaintiff, the son-in-law of the deceased, notwithstanding the conveyance in favour of the plaintiff.

It has been urged by the counsel for the special respondent, the plaintiff, that the fourth defendant's father was divided from his brother, the plaintiff's father-in-law, and that the children of plaintiff by his wife, the daughter of the deceased Rámaliṅgáchchi Reḍḍi, are therefore the legal heirs to the property. This division is, however, denied by the fourth defendant, and the question was not tried in this case, which turned upon wholly different points. We therefore decline now to determine the case on these grounds.

We accordingly reverse the decree of the Civil Judge, and dismiss the plaintiff's claim with all costs.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 412 *of* 1862.

CHINNA GAUNDAN and another.........*Appellants.*
KUMA'RA GAUNDAN........................*Respondent.*

The adoption of an only son is, when made, valid according to Hindú law.

1862. *November* 10. *S. A. No.* 412 *of* 1862.

THIS was an appeal from the judgment of Shaikh 'Abd-ul Ráhemán Sáhib, the Principal Ṣadr Amín of Coimbatore, in Appeal Suit No. 197 of 1861.

The question raised in this appeal was whether the adoption of an only son, was, when made, valid according to Hindú law ?

Branson, for the appellants, cited and relied on the following passages from Mr. Justice Strange's *Manual of Hindú Law*, pp. 18, 19 :

"98. The adoption of an eldest or only son is prohibited.

"99. This prohibition has, however, been considered only directory, and however blameable in the giver to have parted with his eldest or only son, the adoption of such a one if made has been held to be valid. (I. 87 ; Pro. of S. U. 31st July 1824, and 28th July 1825.)

"It has also heen laid down that the prohibition in question does not extend to the adoption of the eldest or only son of a brother, who would stand as *Dvyámushyáyaṇa(b)*, or son to both parents, the natural and the adoptive father.

"There appear to be serious objections to these limitations of the prohibition under consideration. As the very birth of a son delivers the father from danger of *Put*, the eldest or only son, as he comes into the world, secures this deliverance to his parents. The son can, however, secure no more. The

(a) Present Scotland C. J. and Frere, J.

(b) From *dvi* 'two' and *ámushya* 'an individual person.' Here, as in the case of the Roman *adoptio minus plena*, the adoptive son remains in the family of his natural father, but gains a right of succession to his adoptive father.

efficacy of his birth has been expended on his natural father, and it is not available for another. He cannot effect a second deliverance from *Put* in behalf of another. Neither can the benefit, already insured, be withdrawn from the natural father and conferred upon another. The adoption of an eldest or an only son would hence avail nothing to deliver the adoptive father from *Put*. The adoption would fail in its essential use and be for this cause void. And as respects the exception in favour of the adoption of the eldest or only son of a brother on the ground that he is *dvyámushyáyaṇa* or son to both parents, this form of son, however constituted, belongs, it must be observed, to the obsolete law*(a.)* Neither has the adoption of an eldest or only son prevailed to such an extent as to establish the practice as a recognized usage. It is of rare occurrence. The conclusion hence is that the prohibition against the adoption of an eldest or an only son is absolute and that such adoption, under whatsoever circumstances made, is void."

1862. November 10. *S. A. No.* 412 *of* 1862.

He also cited *Rajah Shumshere Mull* v. *Ranee Dilraj Konwur(b)*, in which it was held that, according to the law as current in Benares, the adoption of an only son is invalid unless the natural father deliver his son to the adoptive father on the condition that he should belong to both of them as a son, and the latter accept and adopt him on that condition.

Scotland C. J.:—But the case of *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondree Dossee*(*c*) shews that such a condition will be inferred after the adoption has been performed; and according to *Veerapermall Pillay* v. *Narrain Pillay*(*d*), and the case of the *Rajah of Tanjore*(*e*), such an adoption, though improper or sinful, is not invalid.

Branson: Would your Lordship like to take the opinion of the paṇḍits ?

Scotland C. J.:—No, I am content in this matter to hold by decided cases.

(*a*) There seems to be no authority for this statement. On the contrary Mr. Sutherland lays down (Synopsis II) that an only son of a whole brother, if no other nephew exist for selection, *must* be adopted by his uncle requiring male issue, and is son of two fathers.

(*b*) 2 S. D. A. Rep. 169 : 1 Morley Dig. 17.

(*c*) Fulton, 75 · 1 Morley Dig. 17.

(*d*) 1 Sir T. Strange, N. C. 78.

(*e*) Cited in 1 Sir T. Strange, N. C. 107.

1862. November 10. S. A. No. 412 of 1862.

Tirumaláchá́riyár, for the respondent, referred to *Arunáchalam Pillai* v. *Ayyásvámi Pillai* and to the close of the pandits' opinion given in that case (*a*): "It is not lawful for a man to give his only son in adoption to another......But if such an adoption as aforesaid should take place, although the giver and the receiver in adoption have thereby committed sin, the adoption is valid." He also referred to *Perumál Náykkan* v. *Potti Ammál*(*b*).

Branson replied.

SCOTLAND, C. J.:—This is a short point on which we may clearly come to a conclusion. Two questions are raised—first, did this adoption in point of fact take place?—secondly, if so, was it valid in point of law? It is admitted that the first question must be answered in the affirmative. Then as to the second, the only authority produced is a passage from Mr. Justice Strange's *Manual of Hindú Law*. Everything found in that book is undoubtedly deserving of much respect; but it must be observed that the passage in question is not supported by any cited authority. And on perusing it attentively it is, I think, clear that the learned author must have been dealing with religious considerations strictly; and that when he says the adoption of an only son is 'void,' he means void from the orthodox theological point of view of the çâstras and commentaries, and as being likely in Hindú belief to entail painful consequences in *Put*. But we are here to decide on temporal rights, not to consider such spiritual liabilities; and the application of the maxim *factum valet* to such a point as the present is wise, I think, and justified by many authorities which quite preclude our giving effect to the conclusion stated in Mr. Justice Strange's Manual.

"The result of all the authorities," says Sir Thomas Strange, (*c*) "is that the selection is finally a matter of conscience and discretion with the adopter; not of absolute prescription, rendering invalid an adoption of one, not being precisely him who on spiritual considerations ought to have been preferred." And again: "with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply they are *directory* only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of

(*a*) 1 Mad. Sel. Dec. 156.
(*b*) *S. A. No.* 11 *of* 1849 M. S. D. 1851, pp. 234, 239.
(*c*) *Hindú Law* i. 85.

1862. November 10. S. A. No. 41 of 1862.

the civil law, prevailing, perhaps, in no code more than in that of the Hindús, *factum valet, quod fieri non debuit*"(a). Then there is the case of *Veerapermall Pillay* v. *Narrain Pillay*, with those of the *Rajah of Tanjore, Aruṇáchaḷam Piḷḷai* v. *Ayyásámi Piḷḷai, Nundram* v. *Kashee Pande*(b), *Sreemutty Joymony Dossee* v. *Sreemutty Siboosoondry Dossee*, all of which are noted in the first volume of Morley's Digest, p. 17, and all of which support Sir Thomas Strange's doctrine.

Referring to Mr. Justice Strange's argument, I may observe that it rests on the assumption that it is the birth or adoption of the son that delivers the natural or adoptive father from the danger of *Put*. But surely this is erroneous. It is the son's performance of his father's exequial rites, not his birth or adoption, that relieves the father from the danger in question. Would the father, after the birth or adoption of a son, be considered safe from *Put* if those rites were not performed owing to the son's death, his loss of caste, or for any other reason? If the mere birth of a son were all that was required, it would hardly be laid down, as it is(c), that on the death of such son the affiliation of another is indispensable. Adoption takes place according to Atri(d) "for the sake of the funeral cake, water and solemn rites," and according to Manu(e), for these objects and also for the celebrity of the adoptive father's name. But not for the sake of the supposed efficacy of the mere act of adoption. If, then, the saving virtue lies solely in the performance of the exequial rites, Mr. Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of his son's birth, does not seem to warrant his conclusion. The adopted son may well perform his adoptive father's rites, and in certain cases it appears, when he is a *dvyámushyáyaṇa*, those of his natural father also. It cannot, then, be said that the adoption "fails in its essential use," and is for this cause void. I may remark that the hostility shewn in the çástras to the adoption of an only son arose, probably, from other than mere religious considerations. The true reason, perhaps,

(a) *Hindú Law*, i. 87.
(b) 3 S. D. A. 70. 1 Morl. Dig. 17.
(c) Dattaka Chandriká I, 5.
(d) Ibid. I, 3.
(e) Ibid. and Dattaka Mímánsá, I. 9.

1862. November 10. S. A. No. 41 of 1862.

is furnished by Jagannátha(a), who lays down the law thus: "Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct;" but this, he goes on to say, "does not invalidate the adoption of such a son actually given to him."

On the whole, the case is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way.

Frere, J. concurred.

Appeal dismissed.

(a) 3 Coleb. Dig. 243. So Vasishtha ordains "Let no man give or accept an only son, for he is destined to continue the line of his ancestors." Dattaka Chandriká, I. 27. "In the gift of an only son the offence of extinction of lineage is implied." Dattaka Mímánsá IV. 4. The natural father's lineage is not extinguished when one brother adopts the only son of another. Hence, perhaps, the exception in this case. See Dattaka Mímánsá II. 38.

The Hindú Law, as laid down in the case now reported, varies remarkably from the Roman rule that the last of his gens could not enter a new family, lest the sacra of the gens should be lost.

As to the validity of the adoption of an eldest son, see *R. A. No.* 49 *of* 1853, M. S. D. 1854, p. 31 and *Abajee Dinkur* v. *Gungadhur Wasdeo Gosavee* 3 Morris' Bom. S. D. A. Rep. 420, 424.

Original Jurisdiction (a)

Ecclesiastical Side.

In the matter of the pretended will of TIRUVALU'R KIRUSTNAPPA MUDALI, *deceased.*

The High Court cannot compel a native to prove a will in solemn form, unless he have applied for probate and thus submitted himself to the jurisdiction.

THE *Advocate General*, on behalf of the heir of Tiruvalúr Kirustnappa Mudali, late a merchant and a Hindú inhabitant of Madras, deceased, moved for a citation to the Sheriff of Madras, commanding him to cite Ání Shaṇmuga Mudali and Parasura'ma Mudali, the pretended executors appointed in and by the alleged last will and testament of the said Tiruvalúr Kirustnappa Mudali, to bring in and leave in the registry the said alleged will, and to prove the same in solemn form. He cited three cases. In one of these the late Supreme Court of Madras, on the 24th October 1851, had directed a citation to Kaliyáṇáchárlu and Anantaiyar to bring in a Hindú's will, and prove it in solemn form; and on the 20th of June 1852 a paper in Telugu purporting to be the will was brought in, but nothing further appeared to have been done. In the second—*In re Venkatáchalam deceased*—a Hindú executor, on the 13th of June 1862, applied to the late Supreme Court of Madras for an order citing another person to bring in a will in order that he, the executor, might prove it. Nothing further appears to have been done in this case also. The third case—*Anundchunder Ghose* v. *Soojee Money Dossee*(b)—was as much in point as the second. It ruled that where a Hindú executor made profert of letters testamentary, the late Supreme Court at Calcutta would receive no other proof of the will but the probate itself, or the entry in the Registrar's Book.

1862. *Nov. 7, 11.*

SCOTLAND, C. J.:—The testamentary and intestate jurisdiction of this Court is the same as that which was administered by the late Supreme Court under the letters patent of the 26th December 1800, and (I regret to say) the ecclesiastical practice which governed the Supreme Court

(a) Present Scotland, C. J. and Bittleston, J.

(b) Morton 77.

1862. Nov. 7, 11.

is still the practice of the High Court also. There is no doubt that the Court has power to grant probate of a Hindú will if applied for. But it has, I believe, always been held that a Hindú executor could not be compelled to bring in a will and prove it in solemn form. It is not incumbent upon the representative of a Hindú to take out administration or probate, except in the case provided for in the second section of Act XXVII of 1860; and even then he need not have the certificate, probate or letters of administration, where the Court is of opinion that payment of a debt due to the estate is withheld from fraudulent or vexatious motives, and not from a reasonable doubt as to the party entitled.

There seem, no doubt, to have been two cases in which an application resembling the present was granted by the late Supreme Court. But, in the first, the point as to jurisdiction does not appear to have been mooted, and, though the paper was brought in, nothing further seems to have been done. In the second, the application was by the executor himself: quite a different case from the present, where we are asked to direct a citation against the executor. Neither of these cases, then, can be regarded as an authority for granting the present application. On the other hand there is *Chellammál* v. *Garrow*(a), a direct decision on the subject; where it was held that natives, representatives of a deceased native, are not bound to take out letters of administration, in order to be entitled to sue in favour of the estate, or to act as representatives of the intestate. Nor would the Supreme Court in any instance cite or use any means towards compelling natives to come in and prove wills, or take out letters, or grant them to creditors to the prejudice of the next of kin. And in Calcutta we find from the case of *In the Goods of Hadjee Mustapha*, quoted from Hyde's notes in 1 Morley's Digest, p. 245, that "probate of wills was formerly granted to the executors of Hindús and Muhammadans, conformably to the practice of the Mayor's Court, until the Statute 21 Geo. III arrived in India, *when it was refused.*"

I think it clear that it is optional with the Hindú executor whether he will prove the will or not. The

(a) 2 Sir T. Strange N. C. 1.

Court has no jurisdiction to compel him to do so. If he set up the will in a suit, its validity will be tried, just as is the case in England when a will relating only to realty, and therefore not requiring probate, is set up by some one claiming under it. It is a totally different matter when the executor has actually applied for probate, and thus submitted himself to the ecclesiastical jurisdiction. Then I think the next of kin have a right to compel him to proceed and prove the will: *In the goods of Rempriah Dossee*(a). This motion must therefore be refused.

BITTLESTON, J.:—I also think that the Court cannot compel a Hindú to come in and submit to its ecclesiastical jurisdiction. Under the old Charter that jurisdiction was limited to British subjects, and to such other persons as might voluntarily apply for probate or letters of administration. Unless in cases of Hindús or Muhammadans voluntarily seeking the aid of the Court on its ecclesiastical side, the late Supreme Court could not, and consequently the High Court cannot, compel them to submit to the ecclesiastical jurisdiction. No doubt, if a native litigant set up a will, he must prove it as the law requires, and if he have not the necessary evidence the instrument will not be recognised as a will. But that is not now before the Court. We are asked to cite a Hindú to bring in and prove a will, and I am clearly of opinion that we have no jurisdiction to grant the application.

Motion refused.

(a) Morton 79: 1 Morley Dig. 245-261.

Appellate Jurisdiction (a)

Special Appeal No. 255 *of* 1862.

CHIDAMBARA NAYINA'N..............*Appellant.*
ANNAPPA NA'YKKAN..................*Respondent.*

A bought land from B in 1848, entered into possession, and in 1852 went abroad. In 1853 C bought the same land from B, the land being then registered in B's name, and C. not having notice of A's purchase: *Held* in a suit brought in 1859 that A could not eject C.

1862. *November* 11. *S. A. No.* 255 *of* 1862.

THIS was a special appeal from the decision of George Ellis, the Civil Judge of Cuddalore, in Appeal Suit No. 8 of 1861. The original suit was brought in 1859 before Góvindáchári, the District Munsif of Vilappuram, to recover 2⅜¼th kánis of nañjey and puñjey lands, assessed at rupees 11-10-11, as also ⅛th share of a tank-fishery, and for the transfer of paṭṭá thereof to the plaintiff, who claimed to have purchased the premises in 1848 from Chinnamuttu Náykkan, the husband of Páppammáḷ, the first defendant. The District Munsif dismissed the plaint, on the ground, apparently, that the deed of sale was forged. The Civil Judge on appeal reversed his decree.

Sríniváságháriyár, for the appellant, the second defendant, contended that his client was a purchaser for valuable consideration without notice.

The Court delivered the following

JUDGMENT:—The plaintiff sues upon a purchase of land made by him in 1848 from the first defendant's husband, representing that after being put in possession he went abroad in the year 1852, and on returning, after the lapse of some years, found the second defendant in possession.

The second defendant's plea is that in 1853 he bought the land from the first defendant's husband who was then in possession.

We are of opinion that the second defendant cannot be disturbed by the plaintiff. Whatever the plaintiff's title may have been, he has forfeited it by his own laches. The

(a) Present Strange and Phillips, J J.

second defendant found the first defendant's husband in possession with registry in his name, and there was nothing to lead him to question the title, or to indicate to him that the plaintiff or any other person had any right in the land. 1862. November 11. S. A. No. 255 of 1862.

We therefore consider the decree of the Civil Judge giving the land to the plaintiff to be unsustainable in law, and we set the same aside, thus affirming the decision of the District Munsif.

The costs in appeal and special appeal are to be paid by the plaintiff.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 267 *of* 1862.

CHIDAMBARA PILLAI..................*Appellant.*
MA'NIKKA CHETTI....................*Respondent.*

A sold land to B and continued in possession as B's tenant. More than two years after the sale A and B agreed that A should have the right to repurchase within a fixed time, but that such right should be forfeited if the conditions of the lease were not kept. At the date of this agreement A was in arrear with his rent: *Held* that his right to repurchase was not forfeited by his having incurred further arrears.

THIS was a special appeal from the decree of V. Sundara Náyudu, the Principal Sadr Amín of Negapatam, in Appeal Suit No. 191 of 1861. The original suit, No. 428 of 1860, was brought before John Henry Shunker, the District Munsif of Tranquebar, for the registration in the plaintiff's name of the mírásí of certain lands which he had sold for rupees 600 to the first defendant on the 26th of May 1852. The plaintiff continued in possession as the purchaser's lessee at a svámibhogam rent; and on the 24th August 1854, the parties executed a deed of lease of the lands to the vendor, and also entered into an agreement by which the purchaser agreed to reconvey if the purchase money were repaid within a period therein limited, but which contained the following clause:—"If you [the vendor] fail to pay the amount of the sale within the limited time, you shall have no right to 1862. Nov. 15. S. A. No. 267 of 1862.

(a) Present Strange and Phillips, J J.

1862. November 15. S. A. No. 267 of 1862.

the land. You are further required to act rightly and in conformity with the deed of rent granted by you on this date; and in the event of your failing so to do this agreement shall be null and void." The District Munsif and, on appeal, the Principal Ṣadr Amín, finding that the plaintiff had not observed the stipulations of his lease, held that he had thereby forfeited his right to repurchase.

Saḍagópáchárlu for the special appellant, the plaintiff.

Venkaṭṭaráyalu Náyuḍu for the first defendant.

Mayne for the third defendant.

The Court delivered the following

JUDGMENT:—The plaintiff sold the land in issue to the first defendant on the 26th May 1852. The plaintiff at the same time retained possession of the land on lease under the first defendant at a svámibhogam rent. On the 24th of August 1854, the plaintiff and the third defendant entered into an agreement that the former should have the right to re-purchase the land within a certain time, but that such right should be forfeited if the conditions of the lease were not kept. The first defendant having sold the land to the third defendant within the period in which the plaintiff had the right to repurchase, the plaintiff has brought this suit to set aside the sale and to have the land assigned to him on his making good the purchase-money, rupees 600, agreed upon between himself and the first defendant.

The District Munsif has dismissed the suit on the ground that in the agreement for repurchase it was stipulated that the right to repurchase should be forfeited if the conditions of the lease were not kept, and that these conditions had been broken by the plaintiff falling into arrear with his rent; and this decision has been affirmed by the Principal Ṣadr Amín.

We observe that there is no natural connection between the lease and the right to repurchase, and that the clause of forfeiture is so vaguely worded as to have the appearance of a mere threat, such as in equity, in the absence of specific mention of the nature of the failure which was to bring down the penalty of forfeiture, ought not to be

1862. October 15. S. A. No. 267 of 1862.

enforced. The particular failure on which the forfeiture is held by the Courts below to have been incurred is the non-payment of rent. The arrears, on reverting to the allied suit, Special Appeal No. 268 of 1862, are found to amount to rupees 411, of which 325 were incurred before, and rupees 86 after, the date of the agreement (exhibit A) now under consideration. There having been thus a heavy arrear when the agreement in question was entered into, and no condition having been inserted relative to the discharge of this arrear, we are unable to satisfy ourselves that it was understood between the parties that the incurring of any further arrears of rent should entail forfeiture of the right to re-purchase.

Under these circumstances we reverse the decrees below, and declare that the sale made to the third defendant is void, and that the plaintiff has the right to re-purchase the land in issue, provided he make good the purchase-money within a period, calculated from this date, equivalent to the period for repurchase remaining to him when he instituted this suit.

The costs are to be paid by the first and third defendants.

Appeal allowed.

NOTE.—See *Davis* v. *Thomas*, 1 R. & M. 506; and see *Joy* v. *Birch*, 4 Cla. & Fin. 89; *Ogden* v. *Battams*, 1 Jur. N. S. 791, as to the necessity of pursuing literally a claim for repurchase. See, too, *S. A. No.* 172 *of* 1859, M. S. D. 1860, p. 66: *S. A. No.* 162 *of* 1859, ibid., p. 93: *S. A. No.* 33 *of* 1860, ibid., p. 151.

Original Jurisdiction (a)

Ex parte P. VARADARA'JULU NA'YUDU.

Where a magistrate has, in the exercise of his discretion, refused to proceed with a criminal charge pending a civil action in respect of the matter out of which the charge arose, a mandamus will not be granted to compel the hearing of the charge.

1862. *November* 18.

BRANSON moved for a rule nisi for a mandamus directed to Thomas George Clarke, Magistrate of the Town Police Court of Madras, to take the necessary information of Pasalaikuṭṭi Varadarájulu Náyuḍu, and to try his complaint against Emberumán Svámi.

It appeared from the affidavit in support of the motion that in July 1862 Varadarájulu was in want of money. In order to get funds he gave Emberumán his promissory note for 2,000 rupees, which sum Emberumán undertook to obtain for him upon the security of the note. Emberumán, however, did not get him the money, but indorsed the note to one V. Ratna Mudali. Varadarájulu, after frequent applications to Emberumán, in September 1862 charged him with having fraudulently induced the delivery of the note in question, and then applied to Major T. Evans Bell, Deputy Commissioner of Police for the town of Madras, for a summons founded on the charge. Major Bell referred him to Mr. Clarke the magistrate. Mr. Clarke referred him back to Major Bell, who, on the 28th September, refused to grant the summons. Varadarájulu again went to Mr. Clarke, who granted him a summons attendable on the 6th November. On that day, however, when the case had been opened, Mr. Clarke refused to proceed with it then, inasmuch as there was an action on the note pending in the Civil Court, in which Ratna Mudali, the indorsee, was plaintiff and Varadarájulu defendant. He thereupon dismissed the summons.

(a) Present Scotland, C. J. and Bittleston, J.

Branson submitted that Mr. Clarke, having issued the summons, was bound to enter upon and proceed with the investigation.

SCOTLAND, C. J.:—There is no ground for granting this rule. No authority has been cited, and we must decide from our recollection of the principles and cases applicable to the subject. There are two or three decisions establishing that while a civil action is pending, a court or magistrate may refuse to entertain a charge of perjury relating to the subject of the action—the reason, of course, being that otherwise, even though the charge should fail, the case of one or other of the parties might be prejudiced. The practice of the Central Criminal Court in London is not to try an indictment for perjury while the case out of which it arose remains in any way undetermined. A mandamus, no doubt, is the proper remedy when a magistrate refuses to exercise his jurisdiction, whether such refusal be caused by wilfulness or error. But, on the other hand, a mandamus is a high prerogative writ, and ought not lightly to issue; and is therefore never granted unless it is quite clear that there has been an improper declining of jurisdiction. Then do the facts before the Court show any such declining of jurisdiction on the part of the magistrate? I think not. [His Lordship here stated the facts above set forth, and proceeded thus:] There are cases in which for the ends of justice a magistrate may properly refuse to enter upon a criminal prosecution until after the termination of a civil proceeding pending at the time and connected with the criminal charge. Such are the cases of perjury to which I have already referred. And the same may be said of the present case. It appears that the indorsee Ratna has brought his action against the maker of the note, Varadarájulu. It may be an important question in the action whether or not the terms on which the note was delivered to Emberumán were such as to give him a right to endorse it over, and it might seriously prejudice the trial of that question if the criminal charge were now proceeded with against Emberumán.

I think therefore that this was a case in which the magistrate might fairly exercise his discretion, and refuse as he did, merely to go on with the case for the present. I

1862. November 18. think however he would have acted more regularly if he had not dismissed the summons, but adjourned it till the close of the proceedings in the civil court. But this error, if it be one, is not such as to warrant the Court in issuing a mandamus.

BITTLESTON, J.:—It seems to me also that there is no ground for granting the rule applied for. Mr. Clarke simply exercised the discretion which he undoubtedly possessed. It is unnecessary for us to determine whether in such exercise he was right or wrong. A magistrate's errors of judgment cannot be corrected by a writ of mandamus to rehear. As to the cases referred to by the Chief Justice, I recollect that on one occasion in the late Supreme Court, during a trial for perjury, it was objected that we should not go on, because an appeal to the Privy Council had been filed against a decision in a civil suit concerning the matter on which the perjury was assigned. But in that case I thought that under the circumstances I was not bound by the practice of the Central Criminal Court, and in the exercise of my discretion directed the trial to proceed.

Rule refused.

NOTE.—See *Rex* v. *Ashburn* 8 Car. & P. 50: *Regina* v. *Bartlett* 1 Dowl. & L. 95; *Regina* v. *Ingham* 14 Q. B. 396.

Appellate Jurisdiction (a)

Special Appeal No. 336 *of* 1862.

VENKAṬA'CHA'RI..........................*Appellant.*
ANA'NTA'CHA'RI and others..............*Respondents.*

A mortgaged land to B, the mortgage-instrument providing that B should be entitled to purchase the land if it were not redeemed by 12th July 1843. In 1845, B accepted from A one pagoda in part-payment of the mortgage-money:—*Held* that this was a waiver by B of his right to purchase.

1862. *November* 20. *S. A. No.* 336 *of* 1862.

THIS was a special appeal from the decree of James Wilkins, the Principal Ṣadr Amín of Cuddalore, in Appeal Suit No. 9 of 1861, modifying the decree of the District Munsif of Viḻupuram in Original Suit No. 1409 of 1859.

Saḍagópáchárlu for the appellant, the plaintiff.

The facts sufficiently appear from the following

JUDGMENT:—The plaintiff sues for land purchased by him from the first defendant in the year 1855, offering to redeem a prior mortgage thereon granted by the first to the second defendant and transferred by the second to the third defendant.

The District Munsif decreed for the plaintiff, but on appeal the Principal Ṣadr Amín observed that the terms of the mortgage-bond gave to the mortgagee the right to purchase the property for the additional sum of eight pagodas, if redemption were not effected before the 12th July 1843; and this right he considered to have been transferred to the third defendant, and to be still in him. He therefore disallowed the sale to the plaintiff and dismissed the suit with costs.

We find that after the expiration of the term limited for the redemption of the mortgage, namely in the year 1845, the second defendant accepted from the first defendant the sum of one pagoda in part-payment of the mortgage-money, which was thus reduced from 19 to 18 pagodas; and that in 1853 the second defendant transferred his rights to the third defendant in consideration of the reduced

(a) Present Strange and Frere, J J.

1862. November 20. S. A. No. 336 of 1862.

sum of 18 pagodas. We consider that by accepting the sum of one pagoda, at the time in question, the second defendant abandoned his right to purchase the property, and that all he could and did transfer to the third defendant was his other rights under the instrument of mortgage.

Under these circumstances we set aside the decree of the Principal Ṣadr Amín and affirm that of the District Munsif.

The costs in appeal and special appeal are to be paid to the third defendant.

Appeal allowed.

NOTE.—See *Price* v. *Perrie*, 2 Freem. 258; *Willett* v. *Winnell*, 1 Vern. 488: Coote, Mortg. 14.

Appellate Jurisdiction (a)

Special Appeal No. 803 *of* 1861.

LAKSHMI NA'RAYAṆA......................*Appellant.*

RA'MAPPA CHAKKIRA.....................*Respondent.*

An usufructuary mortgage of lands was executed in 1846, but the mortgagee did not enter into possession. In 1852 his representative, the plaintiff, commenced a suit to obtain possession, but allowed it to drop. In 1854 he commenced the present suit for the same object:—*Held* that laches could not be imputed to the plaintiff from the date of presenting the plaint in 1852, and that the produce from that date should be accordingly awarded him.

1862. November 20. S. A. No. 803 of 1861.

THIS was a special appeal from the decree of Lakshumáya, the temporary Principal Ṣadr Amín of Mangalúr, in Appeal Suit No. 242 of 1860, by which he refused to allow the plaintiff the profits which the latter claimed under a deed of *bhogyádhi*(b), or usufructuary mortgage, dated the 29th March 1846.

Srínivásácháriyar for the appellant, the plaintiff.

The defendant did not appear.

The facts sufficiently appear from the following

(a) Present Strange and Frere, J J.

(b) *Bhogyádhi* is properly an usufructuary *pledge*, from Sanskr. *bhogya*, 'enjoyment' 'possession' and *ádhi* 'pledge.'

JUDGMENT :—The plaintiff brought this suit to obtain possession of property mortgaged to his nephew in the year 1846, together with arrears of produce. 1862. November 20. S. A. No. 808 of 1861.

The District Munsif of Kárkál decreed in his favour, and the Principal Ṣadr Amín affirmed the District Munsif's decree save as to the arrears of produce. These he has disallowed on the ground that the plaintiff's nephew, and after him the plaintiff, should have entered into possession of the land mortgaged, whereby they would have had the usufruct in consideration of their mortgage, and that their not having obtained their usufruct arises from their own laches, for which the plaintiff is not entitled to a remedy.

We think that such laches cannot be imputed to the plaintiff from the date that he took steps to obtain his rights and was wrongfully kept out of them by the defendant. He would thus clearly be entitled to the produce of the land from the year 1854 when he instituted the present suit. But beyond this it is to be observed that he brought a previous suit for the same purpose, namely No. 127 of 1862, which was allowed to drop on the institution of the present suit.

We amend the Principal Ṣadr Amín's decree by awarding to the plaintiff the produce, according to the rate allowed to him by the District Munsif, from the date on which the plaint in the aforesaid suit No. 127 of 1852 was presented, together with costs in proportion.

Appeal allowed.

NOTE.—See *Clarke* v. *Hart*, 6 H. L. Ca. 633; 5 Jur. N. S. 447 S. C.

Appellate Jurisdiction (a)

Special Appeal No. 338 *of* 1862.

RANGASVA'MI AYYANGA'R..............*Appellant.*
KIRISTNA AYYANGA'R..................*Respondent.*

In a suit for land, the defendant pleaded that the land was his ancestral estate. He subsequently tendered evidence, then first obtained, to show that the land had, in 1814, been mortgaged to, and, in 1831, bought by, his father:—*Held* that the evidence was receivable notwithstanding the erroneous plea.

1862. *November* 20. *S. A. No.* 338 *of* 1862.

THIS was a special appeal from the decree of G. T. Beauchamp, the Civil Judge of Tanjore, in Appeal Suit No. 560 of 1860, reversing the decree of the District Munsif of Páppávinásam, in Original Suit No. 172 of 1860.

Saḍagópáchárlu for the appellant, the third defendant.

The facts sufficiently appear from the following

JUDGMENT:—The plaintiff sued for land conveyed to him under a deed of gift by the first defendant's father and the second defendant, and held by the third defendant on mortgage, which mortgage the plaintiff sought to pay off.

The suit was defended by the third defendant, who at first denied that the property had been obtained by his family on mortgage, and alleged that it was ancestral property. At a subsequent stage he put in evidence to shew that the property had come in by mortgage, but had afterwards been purchased by his father.

The District Munsif considered that the defendants' exhibits II and III, which were revenue documents obtained from the collector's kachahrí, evidencing the third defendant's tenure by purchase, and bearing date in 1837 and 1841, afforded proof of adverse possession which, under the statute of limitation, served to bar the plaintiff's title. He accordingly dismissed the suit.

The Civil Judge, in receiving the evidence to the plaintiff's title, has refused to admit the appellant's evidence, because of its conflicting with the prior plea. His decree has therefore been for the plaintiff.

(a) Present Strange and Frere, J J.

1862. November 20. S. A. No. 338 of 1862.

We do not look upon the contradiction of the third defendant's plea by the evidence subsequently adduced as conclusive against the reception of the latter. The land has been in his family under the mortgage since the year 1814, and the purchase was effected in his father's time in 1831. Respecting transactions of so remote a date it is quite possible that the third defendant may have been, as he represents to have been the case, without specific information until he met with the aforesaid revenue documents II and III, which shew the nature of his title. We are therefore of opinion that when he obtained the said specific information, and had the opportunity of introducing it in the suit, he was not estopped from so doing by his previous erroneous plea.

We concur with the District Munsif in thinking that the exhibits II and III afforded clear evidence of the nature of the third defendant's tenure, of which the first and second defendants, and after them the plaintiff, could have informed themselves, and that the prosecution of the plaintiff's title is consequently barred by the statute of limitation.

We reverse the decree of the Civil Judge and affirm that of the District Munsif.

The costs in appeal and special appeal are to be paid by the plaintiff.

Appeal allowed.

NOTE.—See *Standen* v. *Edwards*, 1 Ves. Jun. 133.

Appellate Jurisdiction (a)

Regular Appeal No. 30 *of* 1861.

KUPPUSVA'MIAYYAN..................*Appellant.*
NANNUVAYYAN..........................*Respondent.*

Where no appeal is made against the judgment passed on the subject-matter of the suit, the discretionary power of assessing costs given by section 187 of Act VIII of 1859 should not, unless in a very exceptional case, be interfered with by the appellate court.

1862. *November* 22. *R. A. No.* 39 *of* 1861.

THIS was an appeal from the decree of R. G. Clarke, the Civil Judge of Negapatam, in Original Suit No. 3 of 1860, which was brought for the recovery of the plaintiff's son, a child of nine years of age, which the second defendant was alleged to have decoyed to his house under pretence of shewing it to its maternal grandfather, the first defendant. The Civil Judge decided in favour of the plaintiff, but refused to award him costs. No reason was assigned for such refusal.

Sloan for the appellant, the plaintiff, contended that costs should have been awarded to the successful party.

Branson for the respondents, the defendants, referred to Act VIII of 1859, sec. 187.

The Court delivered a written judgment, from which the following is an extract:

We are of opinion that where no appeal is made against the judgment given on the subject-matter of the suit, the discretion allowed to the courts by section 187 of the Code of Civil Procedure in assessing costs should not be interfered with by the appellate court, unless in a very exceptional case, where the exercise of this discretion has been manifestly in violence of usage and has inflicted marked injustice. No such exceptional case has been made out in the present instance. We therefore dismiss the appeal with costs.

Appeal dismissed.

(a) Present Strange and Frere, J J.

Appellate Jurisdiction (a)

Special Appeal No. 663 of 1861.

ENAMANDARAM VENKAYYA..................*Appellant.*
VENKATANA'RA'YANA REDDI and others...*Respondents.*

Regulation V of 1822 is inapplicable to land held under a mírásídár or any ordinary proprietor. It applies only to land subject to a permanent assessment, and held from Government by a Zamíndár under a permanent sanad or by a temporary occupant.

THIS was a special appeal from the decree of E. Story, the Civil Judge of Nellúr, in Appeal Suit No. 70 of 1861, reversing in part the decree of the District Munsif of Gudúr. The original suit was brought by the plaintiff, who was a mírásídár, to eject the defendants, his tenants at will, from certain wet land, sowable with $4\frac{1}{16}$ túms of seed, and from three kuntás of dry land, belonging to the plaintiff's one and odd svástyams of 26 svástyams of the málguzári agrahâram village of Mambattu, and to recover one putti, 18 túms and 11½ muntas of sambhavu paddy as the owner's share, and the produce of the wet land for Raudri (1860-1861), or its value, and rupees 5-8-6, being tuttu, or fee on the cultivator's share in the produce, as well as nine rupees, the value of manure put by the plaintiff on the lands in suit. The third defendant pleaded that the land had been given "under a permanent kaul to his forefathers seventy years ago." The other defendants allowed the suit to go by default. The District Munsif decreed for the plaintiff; but on appeal the Civil Judge reversed his decree so far as regarded the ejecting the defendants, holding that Regulation V, section VIII, clause 1 applied. That clause enacts that "the lands of under-farmers or ryots shall not be granted to other persons by proprietors or farmers under the provisions of Section X, Regulation XXX of 1802, until such proprietors or farmers shall have made application to the collector and obtained his leave for that purpose."

1862. November 20. S. A. No. 663 of 1861.

Branson for the appellant, the plaintiff. The defendants are mere tenants at will, and the plaintiff is entitled to oust them without having applied to the collector.

(a) Present Strange and Frere, J J.

1862. November 20. S. A. No. 663 of 1861.

Tirumaláchári̇yár for the respondents.

The Court delivered the following

JUDGMENT.—This suit was brought by the plaintiff, a mírásídár, to eject the defendants, his tenants, and to recover arrears of produce.

The District Munsif decreed for the plaintiff.

The Civil Judge awarded the plaintiff the produce, but refused to eject the defendants, considering that the plaintiff was bound to deal with them pursuant to Regulation V of 1822.

Both courts concurred in disbelieving the third defendant's plea of permanent lease.

We consider Regulation V of 1822 inapplicable to land held under a mírásídár or any ordinary proprietor. That Regulation, among other things, is designed to give better effect to the provisions of Regulations XXVIII and XXX of 1802, and these enactments relate to "proprietors of land and farmers of land" of a particular order. The "proprietors" spoken of, as appear by section 3 of Regulation XXV of 1802 and elsewhere, are "Zamíndárs" holding land from Government under a permanent assessment, and by a permanent sanad. The "farmers of land," as shewn by section 2 of Regulation XXVIII of 1802 and elsewhere, are those "holding farms immediately from Government;" that is, having a temporary occupancy of lands subject like those of the Zamíndár to a fixed assessment. The mírásídárs, being ordinary proprietors not thus holding from or under the Government, and having lands not permanently assessed to the revenue, are a different class, for whom special provision has not been made by Regulation V of 1822, or the other Regulations to which we have referred.

Under these circumstances, we amend the decree of the Civil Judge by awarding possession of the land in issue to the plaintiff as decreed by the District Munsif.

The costs in appeal and special appeal are to be paid by the third defendant.

Appeal allowed.

Original Jurisdiction (a)

NA'GALINGA MUDALI *against* SUBBIRAMAṆIYA MUDALI and others.

A grandson may, by Hindú law, irrespective of all circumstances, maintain a suit against his grandfather for compulsory division of ancestral family property.

1862. November 24.

THIS was a suit for an account and division of the undivided property of a Hindú family, the founder of which was one Tirumala Mudali, who died many years ago, leaving two sons, the defendants Subbiramaṇiya and Vírásámi. The defendant Subbiramaṇiya had two sons, one named Perumál, the plaintiff's father, who died in 1850: the other was the defendant Darmaliṇga. The bill was filed in the late Supreme Court on the 12th December 1861.

The defendants' answer stated that the property left by the founder Tirumala Mudali was very trifling, and had been exhausted in his funeral ceremonies; and that the landed property subsequently acquired had been obtained by the defendant Subbiramaṇiya, who, in 1854, had given the bulk of it away.

The Advocate General, for the defendants, contended that the plaintiff's father, if alive, could not sue for division living his father, the defendant Subbiramaṇiya; and that therefore the plaintiff's suit could not be sustained. He cited Sir Thomas Strange's *Hindú Law,* vol. I, p. 179.

Branson, contra, cited Mr. Justice Strange's *Manual of Hindú Law,* sec. 238 : *The Mitákshará,* chap. 1, sec. V., par. 11.

SCOTLAND, C. J. :—The plaintiff may, I think, maintain the suit. I have had some difficulty in seeing how chapter I, sec. II, par. 7 of the Mitákshará is to be reconciled with the placita in the 5th section of the same chapter. But upon consideration I think that they are not necessarily inconsistent, and that sons may compel a division of ancestral family property at the hands of their father. I must however be distinctly understood as deciding this

(*b*) Present Scotland, C. J. and Bittleston, J.

1862. November 24.

with reference to ancestral property only. The Advocate General refers to Sir Thomas Strange's work on Hindú law, and no one can read the passages cited without coming to the conclusion that the opinion of that author was that, except in the instances he gives, namely, of civil death by entering into a religious order, and of degradation working a forfeiture of civil rights, sons could not compel a division. Sir Thomas Strange (i. 179), says "Whatever might be the case among the Hebrews, no Hindú can, according to the law as it prevails in the Bengal provinces, under any circumstances, say to his father, in the peremptory language of the prodigal, "Father, give me the portion of goods that falleth to me." The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper; but, with the exception of two cases, partition among the Hindús in the life-time of the father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons," and in support of this he cites Manu IX. 104 and the Mitákshará, ch. I. sec. II. Turning to the latter we find at paragraph 7 " One period of partition is when the " father desires separation, as expressed in the text ' When " the father makes a partition.' Another period is while " the father lives, but is indifferent to wealth and disinclined " to pleasure, and the mother is incapable of bearing more " sons; at which time a partition is admissible at the " option of sons against the father's wish." Sir Thomas Strange proceeds (i. 179, 180) :—" A text, indeed, of Manu " is referred to, as shewing, that, of ancestral property " belonging to the father, the sons may at their pleasure " exact a division of him, however reluctant; and it is " true (as has been already intimated,) that their claim " upon property descended is stronger than upon what has " been otherwise acquired; but the inference drawn in the ' Mitákshará, is at variance with the current of authorities " including Manu himself; whose obvious meaning, in the " text referred to is simply that ancestral property *recovered*, " without the use of the patrimony, classes, upon partition, " with property *acquired*." And, passing on to consider the law applicable to this Presidency, the same learned author says, (i. 184) " In the provinces dependant on the government of Madras, and elsewhere in the peninsula, the right

of the son to exact partition of ancestral property, independent of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure; such as the father having become superannuated, and the mother past child-bearing, the sisters also married. And there are two occasions upon either of which, wherever the Hindú law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral, or acquired. These are, voluntary *devotion*, by which the father is considered as having renounced it, and *degradation* from caste, by which it is forfeited."

I do not find in Sir Thomas Strange's work anything to get rid of this qualification as to the right of sons to a division in their father's lifetime; and my mind was at one time in considerable doubt on the subject. But in Mr. Justice Strange's Manual of Hindú Law, the learned author states the law in the broadest possible terms. He says in sec. 238. "Sons may at their will, and irrespective of all circum- "stances compel their father to divide with them the an- "cestral property." And for that he cites the Mitákshará, chap. I, sec. V, par. 8. Turning to that passage we find he is abundantly confirmed. It is in these words: "Thus, while the mother is capable of bearing more sons, and the father retains his wordly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." Certainly nothing can be more explicit,—and at par. 11 Vijñáneçvara says, "Manu likewise shows that the father, however reluctant, must divide with his sons at their pleasure, the effects acquired by the paternal grandfather;" and then he refers to the text in Manu, IX. 209, to which Sir Thomas Strange alludes when he says that the inference drawn in the Mitákshará is at variance with the current of authorities.

I think we must consider the Mitákshará, chap. I, sec. II, par. 7, as applicable to the law governing the division of property generally, and sec. V, paragraphs 8 and 11, as applying to divisions of ancestral property.

The Mitákshará, therefore, in my opinion, confirms the view taken by Mr. Justice Strange in his Manual—and in

1862. November 24.

this Presidency the Mitákshará is the governing authority. I think, therefore, that as to ancestral property a son—and therefore a grandson—may compel a division against the will of his father or grandfather.

BITTLESTON, J.:—I come to the same conclusion. The authorities appear to stand thus: Sir Thomas Strange seems to have formed an opinion that sons could not demand a division except under particular circumstances, even as regards ancestral property. But he admits, that, in coming to that opinion, he differs from the Mitákshará. Arguing from Manu, Sir Thomas Strange arrives at one conclusion, and the author of the Mitákshará, also arguing from Manu, comes to another. Referring to the Mitákshará, it is not easy to follow its reasoning on the subject. But it is desirable to arrive at some definite rule. The learned author of the Manual,—bringing to the matter the long experience which he has had, and probably the decisions which have taken place subsequently to the publication of his father's book—says broadly, that, so far as ancestral property is concerned, sons "may at their will, and irrespective of all circumstances, compel their father to divide with them the ancestral property;" and in that proposition he is supported by the statement in the Mitákshará that, though the mother be capable of bearing sons, and though the father retain his worldly affections and does not desire partition of the ancestral (grandfather's) estate, partition does nevertheless take place by the will of the sons. This, doubtless, is not easily reconcileable with the statement in the earlier section. But they may, perhaps, be reconciled by saying that in the earlier section, division generally is treated of, and that the latter section is confined to the division of ancestral property. On the whole it seems to us more satisfactory to decide that the right exists absolutely, than that it should depend on the feelings or disposition of the father or the physical condition of the mother.

A decree was then taken by consent for an account of the undivided family-property come to the hands of the defendants(a).

(a) *Ex relatione* Mr. Branson.

NOTE.—See 3 Coleb. Dig. 35.

Appellate Jurisdiction (a)

Special Appeal No. 15 *of* 1862.

MAILARA'YA..............................*Appellant.*
SUBBAR'A'YA BHUT and others........*Respondents.*

A mortgage-deed contained a condition that if the principal were not repaid by a certain day, the mortgage should only be redeemed by payment of one murá of rice for each rupee of the mortgage-money. The mortgagee was in possession under a prior iladárawára mortgage, and rice rose in the market:—*Held* that the condition was unreasonable and such as should not be enforced in equity.

THIS was a special appeal from the decree of Lakshumayyar, the temporary Principal Ṣadr Amín of Mangalúr, in Appeal Suit No. 174 of 1861, affirming the decree ot the District Munsif of Kárkál, in Original Suit, No. 94 of 1859. 1862. *November* 25. *S. A. No.* 15 *of* 1862.

Sríniváṣácháriyár for the appellant, the plaintiff.

The defendants did not appear.

The facts appear from the following

JUDGMENT:—The plaintiff, now special appellant, instituted the original suit for the recovery of lands under a deed of sale executed by the proprietor, the first defendant, in 1858. The plaintiff at the same time offered to pay off a iladárawára mortgage (b) of rupees 60, which the third defendant held on the lands.

The third defendant pleaded that in addition to the mortgage admitted by the plaintiff, he held a further claim on the land under a second mortgage-deed executed by the first defendant in 1857, by which deed in consideration of a further advance of rupees 60-8-0, the lands were to be held liable for the repayment of this sum in rice, at the rate of one murá for each rupee, or 60½ murás. The third

(a) Present Phillips and Frere, J J.

(b) NOTE.—This kind of mortgage occurs in Kanara, and resembles a Welsh mortgage, the mortgagee being in possession and taking the rents and profits in lieu of interest, and the security carrying a right to redeem, but none to foreclose. The iladárawára mortgagee pays the Government revenue.

1862. November 25. S. A. No. 15 of 1862.

defendant therefore claimed the enforcement of this lien on the land, in addition to the mortgage of rupees 60 admitted by the plaintiff.

The District Munsif was of opinion that the mortgage-deed of 1857, set up by the third defendant, which is designated as No. I in the record of the suit, was fully proved by credible evidence, and on these grounds adjudged the plaintiff, in taking possession of the lands under the deed of sale, to pay off this mortgage according to the terms of No. I, in addition to the previous mortgage of rupees 60 admitted by the plaintiff. This judgment was confirmed in appeal by the Principal Ṣadr Amín.

The plaintiff preferred a special appeal against this decision.

The deed No. I is to the effect that if the advance of rupees 60-8-0 then made by the third defendant, the mortgagee, is not paid off within a certain term which has now expired, it was to be redeemed only by payment in rice at a murá for each rupee of the advance then made, or treble the amount of the original advance, at the now current market rate. This provision was most unreasonable in its character, for the third defendant had possession under the usufructuary mortgage, and could therefore realize any amount of interest which might be agreed upon, out of the net profits of the land. We are further of opinion that it is of the nature of a penal condition and as such should not be enforced in equity.

We therefore modify the decree of the Principal Ṣadr Amín, and award the lands to the plaintiff, who will be entitled to possession on paying off rupees 120-8-0, the amount of the principal sums respectively secured by the two mortgages held by the third defendant. The third defendant will pay the plaintiff's costs throughout.

Appeal allowed.

NOTE.—See *Jennings* v. *Ward*, 2 Vern. 520.

Appellate Jurisdiction (*a*)

Criminal Petition, No. 125 *of* 1862.

THE QUEEN *against* DA'LA'PATI RAU.

1862. *December* 1. *Crim.P.No.*125 *of* 1862.

Where a prisoner was convicted, and sentenced under sec. 50 of Act XVII of 1850, upon the charge of fraudulently secreting a post-letter, and on appeal such conviction and sentence were confirmed:—*Held*, that he could not subsequently be convicted under the same section of having fraudulently made away with the same letter upon the same occasion, both acts being connected and substantially a part of one criminal transaction.

THIS petition was presented by the prisoner against his conviction by L. C. Innes, the Session Judge of Rajahmundry, in Calendar Case No. 75 of 1862, under Act XVII of 1854, sec. 50. That section enacts that "whoever being in employ of the Government in the Post Office Department shall fraudulently secrete, make away with, or appropriate any letter, parcel or packet which may have been entrusted to him, or anything contained in any such letter, parcel or packet, or shall mutilate or break open any such letter, parcel, or packet, or any banghy parcel or box, with the intention of fraudulently appropriating any thing therein contained, shall be punished with imprisonment, with or without hard labour, for a term not exceeding seven years, and shall also be liable to fine."

Mayne for the petitioner.

The facts sufficiently appear from the judgment of the Court, which was delivered by

SCOTLAND, C. J.:—The prisoner in this case appeals against a conviction under section 50 of Act XVII of 1854, upon the charge of his having fraudulently made away with a post-letter, on the ground, amongst others, that he had before been convicted of fraudulently secreting the same letter, and therefore could not legally be tried a second time for an act which was substantially a part of one and the same offence. We are of opinion that this objection is valid and must prevail. The prisoner was the principal officer in charge of the post-office at Cocanada, and before the present charge was made, he had been convicted and sentenced by

(*a*) Present Scotland, C. J. and Frere, J.

1862. December 1. Crim. P. No. 125 of 1862.

the Session Court at Rajahmundry, in Calendar Case No. 64, under the same section, upon the charge of fraudulently secreting the same post-letter and upon the same occasion. Against this former conviction an appeal-petition was presented; and after hearing all that was urged on behalf of the prisoner, we thought the evidence fully sustained the charge, and gave judgment confirming the conviction and sentence.

The section under which both convictions took place, no doubt provides in the alternative, that several acts shall be criminal, and amongst them either of the acts for which the prisoner has been convicted. But to each of such criminal acts it attaches one and the same punishment. In cases to which this section applies the circumstances may go to shew that the party charged had been guilty of all or only some or one of the acts provided against; or it may be altogether doubtful in the first instance which act had been committed; and according to the particular circumstances the prisoner may and should properly be charged at first with all, some, or one of such acts. In the present case the prisoner might properly have been charged in the first instance with both the criminal acts of fraudulently secreting and making away with the letter; and although either act is punishable under the section as an offence without any evidence of the other,—still, as it appears that both acts were connected and formed substantially a part of one and the same criminal transaction, and the evidence with reference to such acts was as necessary and material on the first charge as it was on the second, the prisoner must be considered to have been tried and in peril in respect of the whole transaction as one offence on the first charge. The evidenee as to his making away with the letter was properly a part of the case in support of the first charge and the strongest proof of it. There was in fact no part of the evidence upon which the second conviction took place which was not properly evidence on the first charge. For these reasons the judgment of the court is that the second conviction must be set aside, and the punishment of the prisoner confined to the sentence passed upon him on the first conviction.

Conviction set aside.

Original Jurisdiction (a)

DOE on the demise of KULLAMMA'L *against* KUPPU PILLAI.

A person forcibly dispossessed and suing for possession within six months, is entitled, under Act XIV of 1859, to recover, notwithstanding any other title.

A Hindú wife or widow may alienate her strídhana, whether it be moveable or immoveable, with the exception, perhaps, of land given to her by her husband.

When a plaintiff's evidence fails to shew title in him, but does not shew title in another, the plaintiff may recover upon his possession against a defendant wrongdoer.

The Indian law of limitation as to realty bars the remedy, but does not extinguish the right.

According to the Hindú law in force in the Madras Presidency a sister's son does not inherit.

THIS case was heard on the 7th, 8th and 19th November. 1862. *Nov.* 7, 18, 19. *December* 2.

Mayne for the plaintiff.

Branson for the defendant.

The Court took time to consider, and on the 2nd December the following judgment, from which the facts and arguments sufficiently appear, was delivered by

SCOTLAND, C. J. :—This is an action of ejectment brought to recover a house and premises in Black Town. The case for the plaintiff is that the house and premises originally belonged to Tánammál, who died about twenty-four years ago, a widow, and without issue, and that during her life she conveyed the same by deed of gift to Ela Muttu: that Ela Muttu died about twenty-two years ago, a widow, and without issue, and that she, during her life-time, conveyed the house and premises to the plaintiff, who had been born and brought up in the house; and that ever since Ela Muttu's death the plaintiff had had independent possession of the house and premises, (paying the quit-rent and assessment-bills, and holding possession of the Collector's certificate granted in the name of Tánammál) until she was forcibly dispossessed by the defendant, her brother, in Chittarai (April-May) last.

(a) Present Scotland, C. J. and Bittleston, J.

1862. Nov. 7, 18, 19. December 2.

If the case for the plaintiff be true as regards her having been forcibly dispossessed of the property, section 15 of Act XIV of 1859 applies, and she is entitled to recover her possession notwithstanding any other title set up, the suit having been commenced within six months from the time of the alleged dispossession. At the close of the case, we intimated that we felt no doubt as to the effect to be given to the evidence; and subsequent consideration has confirmed us in the opinion which we had then formed, that the plaintiff satisfactorily proved that, having been in quiet possession of the property down to Máchi (February-March) last, she had been since dispossessed by the defendant without her consent, and certainly otherwise than by due course of law. The facts of her living in the house and being in possession of the key at that time are undoubted, and, considering what was the conduct of both parties, we think every reasonable probability confirms the plaintiff's evidence. The defendant represents that he had been living in the house, and on the return of himself and family from his village in Máchi he found the house locked and sent his son to the plaintiff, then at Ráyapeṭṭai, for the key, which was at once and without objection given up to him; and that he and his family thereupon quietly re-entered the house. Yet he was obliged to admit that on the very next day he was summoned by the plaintiff to the police court for a forcible entry, and subsequently on that charge fined fifty rupees. This account of the manner in which possession was at the time obtained we cannot credit, bearing in mind the proceedings before the Collector recently taken by the plaintiff, and the evidence of the previous disputes between the plaintiff and defendant, if any credit is to be given in this respect to the defendant's case. The cause and the only cause, put forward on the part of the defendant, to account in any way for the alleged abstraction by the plaintiff of his title-deeds and receipts and the consequent disputes and proceedings that took place—namely, enmity produced by the defendant's refusal to give one of his daughters in marriage to the plaintiff's son cannot, we think, seriously be entertained, and the evidence given by the defendant as to the manner of the alleged abstraction of the deeds and receipts by the plaintiff, and as to the defendant's conduct

thereupon, inconsistent as it is in several respects with that of his witness Vírásámi, is altogether untrustworthy. 1862. *Nov.* 7, 18, 19, *December* 2.

This being our opinion as regards the dispossession of the plaintiff, and such dispossession having taken place within six months before the action was brought, the plaintiff is entitled to a verdict under the Act before referred to; and for the decision of the present action it is unnecessary to say more. But in the course of the trial, several questions of law as regards the title to the property were discussed, and as it may prevent further litigation if we at once express our opinion upon these questions, we are induced to do so.

On the part of the defendant it was contended that the plaintiff's evidence shewed that she could have no title in the property, and further that a good title was shewn in the defendant. Now, first, as regards the facts bearing on the plaintiff's title. It is common to the case of both parties that the property was Tánammál's: she was unquestionably in the possession and enjoyment of it; and the certificate or title-deed is in her name. It is also proved that she had a husband whom she survived very many years, and that there was no issue of the marriage. But as to how or when the property came to her, the case is a perfect blank, and certainly, we cannot here infer that she succeeded to this property as widow upon her husband's death, or that it had ever been her husband's.

Now there is no doubt that according to Hindú law, land, as well as any other property, may be possessed by a woman as strídhana (Mitákshará, cap. 1, sec. 2, placita 1-3); and after consulting all the authorities within our reach, we think the law must now be taken to be that with respect to her strídhana (except, perhaps, land, the gift of her husband, as to which we at present say nothing,) a widow is not subject to the restrictions against alienation which clearly apply to property that she succeeds to upon her husband's death. According to the Bengal school of law, it seems clear, that whether as wife or widow, a woman has an absolute power of alienation over her strídhana with the exception of *immoveable* property bestowed upon her by her husband. See the *Dáya-bhága,* cap. 4, sec. 1, placita 21-23. But, as

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is observed by Mr. Sutherland in his remarks at page 430 of the second volume of Sir Thomas Strange's work on Hindú law "the *Mitákshará* is wholly silent on the subject of the power of women to alienate their peculiar property; though explicit in disavowing all authority in the husband to appropriate the same," and the language used by Sir Thomas Strange at page 247 of the first volume of the second edition of his work, as well as the remark of Mr. Sutherland at page 21 of the second volume of the same work, when looked at alone, tend to raise a doubt whether according to the Benares school of law, there is not a general restriction against alienation by a wife or a widow of *immoveable* property held by her under whatever title. When, however, we find it stated in the same work, and by numerous other authorities, in broad and general terms, that a woman's strídhana is her absolute property and at her independent disposal, (with, perhaps, as before alluded to, the exception of land, the gift of her husband); and there being no ground, that we can see, for any distinction in this respect between moveable and immoveable property held by a woman, we are of opinion that the Hindú law recognizes the power of alienation to the extent we have just laid down. We may refer here to the following authorities; Sir Thomas Strange's *Hindú Law*, 2d ed. 1st vol., pages 27, 28, 247, 248: Mr. Colebrooke's remarks in the second volume of the same work, pages 19, 402, and 407: Macnaghten's *Principles of Hindú Law* by Wilson, pages 43, 44, and 136; and Colebrooke on Contracts, page 28.

Considering, then, the possession with enjoyment of the property by Tánammál, as it appears in evidence, and assuming it to be proved that she in fact disposed of the property to Ela Muttu, we think that, as a matter of inference, it must be taken in this case that the property was her strídhana, which she had the power to alienate. Then as to the fact of alienation, the direct evidence of the plaintiff and Kadiya Vélu is certainly not strong; but when the evidence on both sides, as it affects the alleged successive possession in Tánammál, Ela Muttu and the plaintiff is considered, and in particular the evidence as to payments of quit-rent and assessment, and when all the probabilities of the case are looked at, we see no ground to justify a disbelief of the case made on the part of the plaintiff: and as

regards the adoption of the defendant by Tánammál, which was attempted to be set up, the evidence, we think entirely failed; as did also, we think, the endeavour to establish the degree of relationship between Venkattarám, the husband of Tánammál, and Ráma Kishtna, the husband of her sister.

The alienation, then, being valid, there seems to be no further objection as regards the alienation by Ela Muttu; to whom it appears the property was given after the death of her husband; and so title is shewn in the plaintiff, from Tánammál. Independently of this evidence as to title, and supposing it to have failed to shew title in the plaintiff, still we think that unless it had shewn title in some one else, the plaintiff might have recovered upon her possession against the defendant as a wrongdoer (see *Doe* d. *Carter* v. *Barnard*(a); *Davison* v. *Gent*) (b). But then, in order to meet an objection that title had been shewn in a person other than the plaintiff, a further point was argued, namely, that as the period of time within which any suit could be instituted against the plaintiff to recover from her possession of the property was shewn to have elapsed, her title had become absolute by reason of the law of limitations. We have already, at the close of the plaintiff's case, intimated an opinion that the Indian law of limitations bars the remedy only, but does not extinguish the right, as was the case under the limitation-statutes in England before the passing of 3 & 4 William 4, cap. 27, the 34th section of which expressly enacts that at the end of the period of limitation, the right and title of the party out of possession, shall be extinguished—a provision which is not to be found in the present Indian Limitation Act. If, therefore, the plaintiff were driven to rely on the law of limitations alone, we think she would fail. With reference to the passage in the first volume of Sir Thomas Strange's work, p. 33, to which we referred at the trial;—that according to Hindú law, possession for twenty years extinguishes the right of the original owner, we may observe that Mr. Ellis in his remarks at p. 26 of the second volume says, that is not the law in southern India, and that if legal acquisition can be disproved even after the expiration of a hundred years, ownership is not established by possession; and he then quotes this text of

(a) 13 Q. B. 945, 18 L. J. Q. B. 306 S. C.

(b) 26 L. J. Ex. 122.

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Manu, "that he who enjoys without ownership for many hundreds of years, the lord of the earth shall inflict on that criminal the punishment ordained for thieves."

It only remains to notice the points with reference to the title set up in the defendant; and we have already incidentally disposed of the question of adoption, as well as the question of suggested succession through Tánammál's husband Venkattarám. But we may notice another point that was put forward on the authority of a passage in Elberling's *Treatise on Inheritance, &c.*, § 178—that a sister's son was in the line of succession, and that the defendant might therefore take as the son of Púla-Yela, who was the son of Tánammál's sister. But the passage in question refers to a Bengal authority: Elberling himself, at the close of § 178, lays down that according to the school of Benares and Mithila, the sister's sons are excluded, as they belong to a different family; and on the whole it is quite clear that, as Sir Thomas Strange at p. 147, vol. 1, says: "A sister's son inherits in Bengal, but not in the provinces that follow the Mitákshará."

We have thus disposed of all the points made in the case, with the view, as we have said, of preventing, if possible, further litigation between this brother and his sister.

Verdict for the lessor of the plaintiff.

NOTE.—As regards the capability of a Hindú woman to alienate her *saudáyika* (from Sansk. *su* 'good' and *dáya* 'portion'), *i. e.*, the property given to her by her kindred or her husband before or after her marriage, the following texts may be quoted:

Kátyáyana(*a*)—What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord(*b*) or her parents, is called 'a gift from affectionate kindred':

2. And such a gift having by them been presented through kindness, that the women possessing it may live well, is declared by law to be their absolute property:

3. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consist of lands and houses. (3 Coleb. Dig. 573, 574).

The last clause is thus rendered in the *Dáya Krama Sangraha*, chap. II, sec. 2 § 26. The power of woman [leg. women] over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables." So also in the *Dáya-bhága*, ch. IV. s. i. § 21, and the *Vyavahára Mayukha*, ch. IV. sec. X, § 8.

(*a*) Unless Kátyáyana contradicted himself, we must hold that the words 'the estate' in the following text refer solely to property which a widow inherits as such: "The childless widow, preserving inviolate the bed of her lord and strictly obedient to her spiritual parents may frugally enjoy *the estate* until she die; after her the legal heirs shall take it." 3 Coleb. Dig. 576: vide tamen Jagannátha's comment. Ibid. 575, 576, 577.

(*b*) It seems doubtful whether we should read *bhartu* 'husband' or *bhrátu* 'brother.'

Texts restricting the power of a widow to alienate immoveables given to her by her husband are these :—

Nárada :—Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses (3 Coleb. Dig. 575.)

Vishnu [or Nárada?]: What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property. (*Mitákshará* chap. I, sec. I. § 20).

The *Ratnákara* :—A woman has absolute exclusive dominion over such gifts [scil. gifts to her separate use], consisting of lands and houses, except such immoveables as her husband gave her (Coleb. Dig. III, 575.)

The *Dáya Krama Sangraha* (chap. II, sec. 2. § 31) :—"*Even in the case of immoveables*" relates to immoveable property other than that which has been bestowed upon her by her husband, for a prohibition exists against the gift or sale by a woman in regard to immoveable property given to her by her husband; So NA'RADA, " what has been given" &c. *ut supra.*

The *Dáya-bhága* (chap. IV. sec. I. § 23) :—"But in the case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like. So Nárada declares: What has been given" &c. *ut supra.* It follows from the specific mention of " given by a husband" that any other immoveable property, except such as has been given to her by him, may be aliened by her. Else [if this text forbid donation in the case of immoveables in general—Çríkṛishṇa] the preceding passage concerning the power of women in respect of donation and of sale, " according to their pleasure, even in the case of immoveables" would be contradicted.

The *Vyavahára Mayukha* (ch. IV. sec. X. § 9) :— " But over immoveable property given them by their husbands they do not possess full power, from this text of Nárada: " What has been given" &c. *ut supra.*

The passage in Elberling's treatise, referred to in the judgment, is as follows :—

"Sons of different sisters take according to numbers born as well as unborn, and even unbegotten at the time of their uncle's death." *Bijia Deby* v. *Unnapoorna Deby* 1 S. D. A. 162 : *M. Solookuna* v. *Ramdolal Punde,* ibid. 324.

As regards the capability of a sister's son to inherit in Bengal see *Dáya-bhága* c. XI s. VI. 8 : and the following cases digested by Mr. Morley :—*Rajchunder Naraen Chowdry* v. *Goculchund Goh* 1 S. D. A. 43 : *Ram Dulal Nag* v. *Rajiswari* 5 S. D. A. 55 : *Karuna Mai* v. *Jai Chandra Ghos,* Ibid. 42 : *Kishn Lochan Bose* v. *Tarini Dasi,* Ibid. 55 : *Lakhi Priya* v. *Bhairab Chandra Chaudhuri,* Ibid. 315 : (see Mr. Morley's note 1 Morl. Dig. 327) : *Adaitachand Mandal and others, Petitioners,* 2 Sev. 131 : *Aulim Chund Dhur* v. *Bejai Govind Burrall,* 6 S. D. A. 224 : *Sumbochunder Ray* v. *Gunga Churn Sein* Ibid. 234.

As to a sister's son's capability to inherit in Bombay see *Laroo* v. *Sheo,* 1 Borr. 71 : *Ichharam Shumboodas* v. *Prumanund Baeechund,* 2 Borr. 471. As to a sister's grandson in Bombay, see 3 Morris 156.

The present decision, as to the incapability of a sister's son to inherit in Madras, affirms *R. A. No.* 33 *of* 1858, Mad. S. D. 1858, pp. 209, 211 and *S. A. No.* 84 *of* 1860, Mad. S. D. 1860, p. 245.

Original Jurisdiction (a)

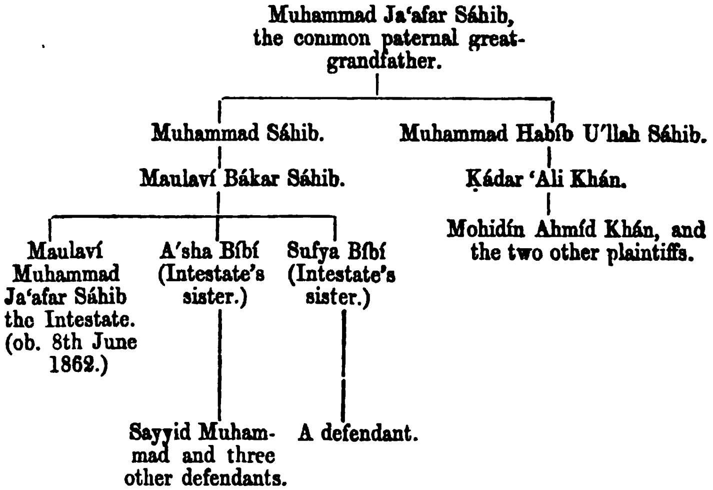
Mohidi'n Ahmi'd Kha'n and others v. Sayyid Muhammad and others.

By Muhammadan law descendants in the male line of the paternal great-grandfather of an intestate are within the class of 'residuary' heirs, and entitled to take to the exclusion of the children of the intestate's sisters of the whole blood.

In a suit between Muhammadans a pedigree may be satisfactorily established merely by oral evidence.

1862. *December* 4, 5.

THIS was a suit to obtain possession of the real and personal estate of Maulaví Muhammad Ja'afar Sáhib, late of Madras, who died intestate in June 1862. The plaintiffs claimed as descendants in the male line of Muhammad Ja'afar Sáhib, the common paternal great-grandfather of the intestate and themselves: the defendants claimed as the children of the intestate's sisters of the whole blood. All the parties were Muhammadans and Sunnís. Their relative position will be more easily understood from the following pedigree.



The Advocate General (*Mayne* with him) for the plaintiffs.

Branson, for the defendants, contended that the plaintiffs on their own shewing were 'residuaries'(b) in the colla-

(a) Present Scotland, C. J. and Bittleston, J.

(b) 'Residuaries' ('*asbát*, literally 'nerves,' 'ligaments') are the heirs entitled to the residue (if any) after the 'sharers' (*askábe faraíz*, literally 'masters of successions') have been satisfied, see Elberling's *Treatise on Inheritance*, &c. §§ 113,—121; Sicé, *Traité des Lois Mahométanes*, chap. II.

teral line, and that, as regarded succession, the class of such residuaries was confined to paternal uncles and their lineal male descendants. He cited the following passage from Sir Wm. Macnaghten's *Principles and Precedents of Muhammadan Law,* chap. I, sec. III, cl. 43 :— 1862. *December* 4, 5.

" Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries), the daughter's children and the children of the son's daughters succeed; and they are termed the first class of distant kindred."(a)

SCOTLAND, C. J.:—The plaintiffs claim, through the common paternal grandfather, as related to the deceased Maulaví Muhammad Ja'afar Sáhib in the sixth degree; and seek to recover the estate of the deceased from the defendants, the children of his sisters of the whole blood. The first question is whether the pedigree on which the plaintiffs rely is made out satisfactorily ?

The plaintiffs' case rests entirely on the oral statements of deceased relatives; and certainly in England this kind of evidence would not be regarded as satisfactory if unsupported by the usual evidence derived from registers of births, marriages and deaths, entries made by members of the family in books, inscriptions on tomb-stones or monuments, or the like. But here I have no judicial knowledge of the existence among Muhammadans of a register of births and deaths; neither am I aware that it is ever possible to procure among them evidence of the other descriptions which I have mentioned. Nothing of this kind has been shewn or suggested. We must therefore deal with and give effect to the oral evidence in this case. Some of the witnesses, no doubt,

(a) 'Distant kindred' *(zaví'l-arhám,* literally 'persons of the wombs') are persons related to the deceased, but taking only when he has left neither 'sharers' nor 'residuaries.'

1862. December 4, 5.

were personally interested, but that goes to their credit, not to their competency. [His Lordship here minutely analysed the evidence and continued thus :] The mode, moreover, in which all the plaintiffs' witnesses gave their testimony was such as to lead to the conviction that they were telling the truth: they were unshaken, too, by a severe cross-examination; and the defendants have failed to adduce any direct evidence to meet the case made by their opponents. I must accordingly regard the plaintiffs' relationship as proved by trustworthy testimony.

Then as to the law. The question—raised, I believe, for the first time in this Court—is whether descendants in the male line of the paternal great-grandfather of an intestate are within the class of "residuary heirs," and therefore entitled to take to the exclusion of sons and daughters of the intestate's sisters of the whole blood—the intestate being the person last legally possessed of the property? There is no doubt that sisters' children surviving their mothers can only be entitled to succeed as "distant kindred;" and it seems equally clear that before the class of "distant kindred" can take any share in the property, all the relations of the deceased, who come within the class of "residuary heirs" must be exhausted. There is no ground, I think, for the argument put forward on the part of the defendants, that assuming collateral male relations claiming through the great-grandfather of the deceased to be within the class of "residuaries," their claim to succeed does not arise until after the "distant kindred" in the same degree of relationship with the paternal uncles have been exhausted. If male descendants claiming through the great-grandfather of the deceased are properly among the number of his "residuary heirs," they, equally with the male descendants from the grandfather—that is paternal uncles and their lineal male issue—are entitled to the property to the exclusion of all "distant kindred."

Here the plaintiffs claim through Muhammad Ja'afar Sáhib as the common paternal great-grandfather of the deceased and themselves; and the point of Muhammadan law which we are called upon to decide is, whether, assuming their alleged relationship to be proved, they are included in

the class of "residuary heirs" to the deceased in the male collateral line; for, if so, they are legally entitled to succeed, to the exclusion of the "distant kindred." 1862. *December* 4, 5.

Now the general rule of law as regards "residuaries" in their own right is stated upon the authority of the *Sirájíyyah*(a) to be this: "every male in whose line of relation to the deceased no female enters" is a residuary in his own right(b); and succeeds as such preferably to any "distant kindred." This was adopted and acted upon in the case of *Bhanoo Beebee* v. *Emaum Buksh*(c). No question is or can be made as to the undoubted application of this rule to males in the right line of ascent and descent, as well as to collateral male descendants of the deceased's grandfather. But on the authority of a passage in Sir Wm. Macnaghten's work on the *Principles and Precedents of Muhammadan Law* it is contended that as regards collaterals the class of "residuaries" is confined to paternal uncles and their lineal male descendants. And certainly the passage in question does afford ground for the argument. In enumerating in cap. I. sec. III. cl. 43 "sharers" and "residuaries" who take before "distant kindred," the very learned author does expressly mention paternal uncles and their sons—thus impliedly excluding paternal granduncles and their male issue. But in Mr. Baillie's book this difficulty is dealt with very clearly and satisfactorily. He says (p. 78): "The only passage in the translation of the *Sirájíyah* bearing directly on the point that I am aware of, is the following, which does certainly seem to countenance the doctrine of the limitation of residuaries in the collateral line to the descendants of the grandfather, though it is at the same time obviously inconsistent with the general definition of the term with which the paragraph commences. Now the residuary in his own right is every male in whose line of relation to the deceased no female enters; and of this sort there are four classes; the offspring of the deceased and his root, and the offspring of his father and of his *nearest* grandfather, a preference being given, I mean a preference in the

(a) Baillie 72, Macnaghten's Principles and Precedents of Muham. Law, p.

(b) 1 S. D. A. Rep. 68—H. Colebrooke and Harington, J J.

(c) The highest authority on the law of inheritance among the Sunnís of India. It has been translated by Sir William Jones.

1862. December 4, 5.

right of inheritance, according to proximity of degree. The offspring of the deceased or his sons *first*; then their sons, in how low a degree soever: then *comes* his root, or his father, then his paternal grandfather, and their paternal grandfathers; then the offspring of his father, or his brothers, then their sons, how low soever; and then the offspring of his grandfather or his uncles, then their sons how low soever"(*a*). Mr. Baillie then points out that the word 'nearest' in this quotation crept in by mistake into Sir W. Jones' version of the Sirájíyyah. "There is nothing in the preceding quotation which cannot be reconciled with the definition of "residuary" at its commencement, except the words "nearest grandfather;" and we have fortunately the means of shewing beyond dispute that these are an inadvertence of the translator. In the copy of the text annexed to the translation, the vowel-marks are inserted, and if these be correct, it is obvious that the words "nearest" and "grandfather" cannot agree together: and they are so distinct from each other in the Calcutta edition, which contains both the text and the commentary printed together, that the commentator stops at the word "grandfather," to make an observation on the sentence that concludes with it, before he suffers the reader to proceed to the next, which begins with the word "nearest"(*b*). The passage, as it stands in the Calcutta edition, and stripped of the commentary, a part of which has slipt into the text of Sir William Jones' copy, and may have given rise to the mistake in question, is literally as follows: "and they are four classes: the offspring of the deceased, and his root, and the offspring of his father, and the offspring of his grand-father. The nearest is nearest. I mean by this, that the first in the inheritance is the offspring of the deceased, or the sons; then their sons, how low soever; then his root, or the father; then the grand-father, or father's father, how high soever," &c. The reader will observe, that the term grand-father is here taken in its proper comprehensive sense, to signify the lineal male ancestor however remote, and, but for the word nearest, the insertion of which I hope has been satisfactorily explained, there is nothing from which it can be gathered that the term was to be taken in a less compre-

(*a*) Sir W. Jones' Works, vol. III, p. 523.
(*b*) Shuríffa, Appendix, No. 149.

hensive sense when the descendants of the grand-father are mentioned. It is true, that these are described a little lower down as uncles, but the word in the Arabic, which has been so translated, is one of equal comprehensiveness, being employed to designate not only the father's brothers, but the brother of any male ancestor however remote, provided he be connected with the deceased through males.(a) "It is to be observed that if the enumeration of residuaries contained in the paragraph quoted from Mr. Macnaghten's work be complete, all relatives beyond the descendants of the grand-father are excluded, though they should fall within the general definition of the *Sirájíyah.*

Mr. Baillie then quotes three distinct authorities shewing that the estate goes to the descendants of the great-grand-father. The first of his quotations is from the *Khuduri,* a book, he says, of very high authority in Arabia, and generally supposed to be the principal source from which the author of the *Hidáya* obtained the text of the law on which his own work is a commentary. The quotation is "The nearest residuaries are the sons; then their sons; then the father; then the grand-father; then brothers; then their sons; then the sons of the grand-father and they are paternal uncles; *then the sons of the father of the grand-father, and they are paternal uncles of the father(b).*" Then follows an extract from the *Futáwa Sirájíyah.* "The nearest residuaries to the deceased in their own right are sons; then their sons; then the sons of their sons how low soever; then the father; then the grand-father, or father's father how high soever; then the full brother; then the half-brother by the same father; then the sons of the full brother, then the sons of the half-brother by the same father; then their sons in this manner; then the father's full brother; then the father's half-brother by the same father; then the sons of the father's full brother; then the sons of the father's half-brother by the same father; then their sons after this arrangement, *then the paternal grand-father's full brother; then the paternal grand-father's half brother by the same father; then their sons after this arrangement.*"(c)

(a) Sirajíyah and Shurífía, Appendix No. 150—Appendix No. 151.
(b) Appendix No. 151.
(c) Futáwa Sirájíyah, Appendix No. 152.

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Mr. Baillie then cites, but does not quote, a passage, from the *Futáwa 'A'lamgírí.* In this, he says, "the enumeration of residuaries, after proceeding in nearly the same terms as those of the last quotation, is carried one step higher to the paternal uncles of the grand-father, that is, to the descendants of the great great grand-father(a). "If," says Mr. Baillie, these works are to be allowed any weight at all, it "is clearly impossible that the limitation implied in the expression 'descendants of the nearest grand-father,' can be correct; and there is nothing else, even in Sir William Jones's translation of the passage previously quoted from the *Sirájíyah,* to restrict the meaning of the definition of the term 'residuary,' with which the paragraph commences, the comprehensiveness of which is worthy of the reader's particular attention. 'Now, the residuary in his own right,' says the author, 'is every male in whose line of relation to the deceased no female enters.' "

Mr. Baillie lastly refers to the case of *Doe* dem. *Sheikh Moohummud Buksh* v. *Shurf Oon Nissa Begum,* tried in the Supreme Court at Calcutta, in the second term of 1831. There "it was decided in conformity with the above authorities, which were brought to the notice of the Judges and the *fatwá* of Maulavi Morad, head Muhammadan officer of the Court, that the plaintiff, who was descended from the great grand-father of the deceased, was entitled to a share of the residue."

The passage cited by Mr. Branson is moreover inconsistent with an observation by Sir William Macnaghten in the Preliminary Remarks (*Prin. and Prec. of Muhammadan Law,* p. XI) that "the residuaries by relation are the sons and their descendants, the father and his descendants, *the paternal ancestor in any stage of ascent and his descendants.*" The words italicised seem certainly, as Mr. Baillie (p. 78 n.) remarks, to comprehend the collaterals, however remote from the deceased; and I cannot help thinking that in the present case Sir William Macnaghten would have considered the plaintiffs entitled to succeed.

(a) Futáwa 'A'lamgírí, Appendix No. 153.

1862. December 4, 5.

Lastly, it is only necessary to refer to the case of *Shah Ilahi Baksh* v. *Shah Casim Ali(a)*. There the deceased was in the sixth degree of descent in the male line from the common ancestor, and the appellant in the fourth degree from such ancestor; so that the appellant was in the tenth degree from the deceased. And it was held by the Bengal Ṣadr Diwání 'Adálat (H. Colebrooke and Harington, J J.) that the appellant was entitled as residuary to the exclusion of the respondent, who was the son of the sister of the deceased.

Under these circumstances it is clear that judgment must be for the plaintiffs. All doubt raised by the passage cited from Sir Wm. Macnaghten's work is removed by reference to Mr. Baillie's book and to that decision in the Bengal Ṣadr 'Adálat. As respects their hereditary right the plaintiffs are entitled to recover. But the case must be adjourned to enable both parties to supply evidence as to the value of the property in dispute.

BITTLESTON, J. concurred.

Judgment for the plaintiffs.

(a) 1 S. D. A. 98: 1 Morley Dig. 339—340.

NOTE.—In the course of the case one of the plaintiffs' witnesses, an aged and infirm Muhammadan hakím, was carried forward to give his evidence. On the Ḳurán being tendered to him to kiss, he said that he had no objection to the use of oaths in general, but that on the present occasion he could not touch that holy thing, as he was suffering from dysentery, and therefore in need of purification.

The Advocate General proposed to ask the witness whether he would not feel himself bound to speak the truth if he bowed his head within a few inches of the Ḳurán.

Branson objected.

SCOTLAND, C. J.:—This is not the case of a person entertaining a conscientious objection to the use of an oath. He merely declines to take it on the ground of present disqualification, and he must be sworn in the regular way or not at all.

Act V of 1840, substituting solemn affirmations for oaths among Hindús and Muhammadans, does not extend to any declaration or affirmation made in any of Her Majesty's courts of justice.

Appellate Jurisdiction (a)

MANTENA RAYAPARA'J..................*Appellant.*
CHEKURI VENKATARA'J..................*Respondent.*

By Hindú law an exchange of lands followed by possession, need not be evidenced by writing.
Special Appeals Nos. 102 *of* 1853, 69 *of* 1856 and 195 *of* 1858 observed upon.

1862. *December* 5. *S. A. No.* 20 *of* 1862.

THIS was a special appeal against the decree of M. Jagga Rau, the Principal Ṣadr Amín of Rajahmundry, in Appeal Suit No. 182 of 1861. It raised the question whether or not a merely verbal grant of land in exchange, followed by possession, is valid by Hindú law ?

Sloan, for the appellant, the plaintiff, contended that the grant should be evidenced by writing, and that it would lead to frequent fraud if the law were otherwise.

Branson, amicus curiae, referred to *Doe* dem. *Seebkristo* v. *The East India Company(b).*

SCOTLAND, C. J.:—Upon the only point now before us we must hold the present transaction valid. It seems from the case just referred to and other authorities, that, under the Hindú law, proof of a verbal grant of land, whether by way of exchange, sale or gift, is good when followed by possession and otherwise unobjectionable. Indeed in no case does Hindú law appear absolutely to require writing, though as evidence it regards and inculcates a writing as of additional force and value. 1 Strange, *Hindú Law* 277. (See also a case decided by the Madras Ṣadr 'Adálat, Special Appeal, *No.* 56 *of* 1857*(c)*—where a verbal assignment of waste land was held valid.)

There are instances, no doubt, in which works of authority speak expressly of particular transactions being evidenced by writing. But I believe in no case can it be considered now that the Hindú law in this respect is treated as being anything more than directory. The great importance and value, however, of written instruments as evidence,

(*a*) Present Scotland C. J. and Phillips, J.

(*b*) 6 Moore I. A. Cases 267. (*c*) M. S. D. 1857, pp. 142, 143.

1862. December 5. S. A. No. 20 of 1862.

make it most desirable for the true interests of the parties and the ends of justice, that they should be generally adopted; and where from the circumstances and nature of the transaction, or the dealings between the parties, or from the usages of the country, a writing was reasonably to be expected, mere oral evidence would very properly be received and acted upon with extreme caution and deliberation; as such evidence alone can unquestionably be easily made the means of falsehood and fraud. The reported cases in which the Ṣadr Court appears to have decided against the sufficiency of oral evidence in the instances of a sale of land, an assignment of a bond, and a perpetual lease(a) we cannot, I think, regard as satisfactory authorities in so far as they were intended to decide not merely the insufficiency of the particular circumstances in evidence in each case, but that the law rendered a writing absolutely indispensable to the validity of such sales, assignments and leases. Upon the present occasion we are concluded by the decision of the Principal Ṣadr Amín upon the evidence in point of fact, and in point of law we think the objection raised is not valid.

PHILLIPS, J. concurred.

Appeal dismissed.

(a) *S. A. No.* 69 *of* 1856, M. S. D. 1856 p. 150: *S. A. No.* 102 *of* 1853, M. S. D. 1854, p. 40; *S. A. No.* 195 *of* 1858, M. S. D. 1859, p. 63.

NOTE.—As to the special rules of Hindú law relating to exchanges see 2 Colebr. Dig. 336, where Jagannátha lays down that the subjects exchanged must be of the same nature, and that their quantities or pecuniary values must be equal. As to the latter proposition the Hindú law, like English Equity (*Bartram* v. *Whichcote* 6 Sim. 86; *Ferrand* v. *Wilson* 4 Hare 385) appears to admit of the receipt of money for owelty of exchange: *R. A. No.* 86 *of* 1851, M. S. D. 1852, pp. 144, 146.

The following appear to be some of the instances referred to by the Chief Justice "in which works of authority speak expressly of particular transactions being evidenced by writing:" "When the bailee carries the very thing bailed to another for pledge he shall cause a deed of pledge to be recorded in writing and give with it the deed [which he received] in the first instance," Prajápati, cited in the *Vyavahára Mayukha* p. 24. "Let a king having given land, or assigned *fixed property*—cause his gift to be written, for the information of good princes who will succeed him, either on prepared silk or on a plate of copper, sealed above with his own signet." Yájñavalkya and Brihaspati cited in the *Vyavahára Mayukha* p. 26; and see 2 Coleb. Dig. 160, 162, 163.

Appellate Jurisdiction (a)

Special Appeal No. 451 *of* 1861.

MAKUDU RAVULLAN......................*Appellant.*

MASTA'N SA'HIB and others............*Respondent.*

On a Special Appeal the respondent has no right to take any objection to the decision appealed against which he might have taken if he had preferred a separate special appeal.

Issur Ghose v. *Hills* (1 Ind. Jur. 25) not followed.

1862. *December* 6.

S. A. No. 451 *of* 1861.

THIS appeal involved several complicated questions arising from the Muhammadan law of inheritance.

Tirumaláchdriyár for the appellant, the plaintiff.

Branson, for the respondents, the first and fourth defendants, submitted that upon the authority of *Issur Ghose* v. *Hills*(b), he had a right to take any objection on the part of the respondents to the decision of the lower Court, which he might have taken if he had preferred a separate special appeal. He admitted that such had not hitherto been the practice of this Court. The right was here allowed to be exercised only in regular appeals. It had been denied to respondents in special appeals. But he submitted whether after the ruling by the High Court at Calcutta, the Court would not allow the matter to be reconsidered; and in the event of his being permitted to do so, he should submit that the appellant himself had no title.

PER CURIAM:—We are not prepared to depart from our practice.

The case then proceeded on the points taken in appeal, and resulted in a remand for further investigation.(c)

(a) Present Strange and Phillips, J J.

(b) 1 Ind. Jur. 25, 29. This was an appeal from a decision under Act X of 1859.

(c) *Ex relatione* Mr. Branson.

Appellate Jurisdiction (a)

Referred Case No. 6 of 1862.

SABHA'PATI MUDALI *against* MUTTUSVA'MI MUDALI and others.

An order from the High Court is necessary to enable a Court of Small Causes to entertain a suit against several obligors, one of whom, at the time of filing the plaint, is neither resident, nor personally working for gain within the limits of its jurisdiction.

Such order should be applied for after the reception of the plaint, upon a statement of the circumstances of the particular case.

Sec. 21 of Act XLII of 1860 is to be given the same operation as if Act XXIII of 1861 had formed part of Act VIII of 1859 when it became law.

THIS was a case referred for the opinion of the High Court by F. C. Carr, Acting Judge of the Court of Small Causes of Cuddalore. 1862. *December* 8. *R. C. No.* 6 *of* 1862.

The facts sufficiently appear from the following judgment, which was delivered by

SCOTLAND C. J. :—This is a case stated for the decision of the High Court by the Acting Judge of the Court of Small Causes at Cuddalore under section XIII, Act XLII of 1860; and the question submitted is, whether in a suit for the recovery of principal and interest due upon a bond, against three defendants (the obligors), one of whom at the time of the filing of the plaint was resident out of the jurisdiction of the Court, an order of the High Court is necessary and ought to be granted, under section IV Act XXIII of 1861, to enable the Court of Small Causes to proceed to hear and determine the suit ?

Looking to the provision as regards jurisdiction contained in section IV of the Act establishing Courts of Small Causes (Act XLII of 1860), it is clear that unless the 4th section of Act XXIII of 1861 applies, the Cuddalore Court of Small Causes had no jurisdiction even to entertain the suit as against the defendant not resident, nor (as it is assumed) personally working for gain, within the limits of its jurisdiction.

(a) Present Scotland, C. J. and Phillips, J.

1862. December 8. R. C. No. 6 of 1862.

With regard to the question whether the latter Act applies, it is to be observed that the Courts of Small Causes exercise a limited and, with some exceptions, an exclusive civil jurisdiction, and by section XXI of Act XLII of 1860, which contains no provision applicable to this case, it is expressly enacted that, except as thereinbefore provided, "the provisions of Act VIII of 1859 shall be applicable to cases cognizable under this Act, in so far as the same may be applicable and necessary," and by the 44th section of Act XXIII of 1861 it is enacted that "this Act shall be read and taken as part of Act VIII of 1859."

Giving effect to the latter enactment, this Court must give the same operation to section XXI of Act XLII of 1860, as it would have done if the provisions of Act XXIII of 1861 had actually formed a part of Act VIII of 1859 at the time when it became law; and so construing the section, the remaining question is, whether the provision in section IV of Act XXIII of 1861 is to be considered as "applicable and necessary" to this case? We are of opinion that it is. The intention of the section is to provide against the expense and inconvenience of several suits in respect of the same cause of action; and it appears to us to be in all respects just as applicable and necessary to suits of this nature in Courts of Small Causes, as to suits in any of the Courts of Civil jurisdiction, to which the Code of Civil Procedure applies.

The case, therefore we think, is one in which the order necessary to give jurisdiction to hear and decide the suit should issue under section IV Act XXIII of 1861. As the Court of Small Causes is not subordinate to the District Court, but is subject to the control of the High Court, such order must issue from the High Court; and it will go to the Court in which the suit is now pending, there being nothing to shew that the suit can more properly be tried by any other competent Court.

The effect of this decision is to require, for the future, in all similar cases, an application to be made, after the reception of the plaint, for the requisite order, upon a statement of the circumstances of the particular case.

Appellate Jurisdiction (a)

Special Appeal No. 286 *of* 1862.

SVA'MIYA'R PIḶḶAI.....................*Appellant.*
CHOKKALIṄGAM PIḶḶAI...............*Respondent.*

Special Appeal No. 299 *of* 1862.

CHOKKALIṄGAM PIḶḶAI.................*Appellant.*
SVA'MIYA'R PIḶḶAI.....................*Respondent.*

A suit cannot be brought on behalf of a Hindú minor to secure his share in undivided family property, unless there is evidence of such malversation as will endanger the minor's interests if his share be not separately secured.

THESE were special appeals from the decree of V. Sundara Náyuḍu, the Principal Ṣadr Amín of Negapatam, in Appeal Suit No. 113 of 1861, affirming the decree of J. H. Shunker, the District Munsif of Tranquebar, in Original Suit No. 509 of 1859. 1862. *December* 9. *SS. AA. Nos.* 286 *&* 299 *of* 1862.

Veṅkaṭṭaráyalu Náyuḍu for Svámiyár Piḷḷai, the plaintiff.

Saḍagópáchárlu for Chokkaliṅgam Piḷḷai.

The facts sufficiently appear from the following

JUDGMENT:—This suit has been brought to obtain on behalf of a Hindú minor the possession of his share in undevided family property, and judgment to that effect has been passed by the District Munsif, whose decision has been affirmed by the Principal Ṣadr Amín.

We think that such a suit as the present cannot legally be maintained unless there is evidence of such malversation as to place the minor's interests in risk if his share be not separately secured to him. In the present instance such malversation has not been alleged. It may be a question to what particular share the minor may be entitled, but this being raised affords no warrant for claiming a partition in his name. When he comes of age it will be for him him-

(a) Present Strange and Frere, J J.

1862. December 9. SS. AA. Nos. 286 & 299 of 1861.

self to claim, should he elect to do so, what may be his due. In the meanwhile there can be no valid objection to the property remaining in its normal state of a joint inheritance.

We therefore reverse the decrees below and dismiss the suit with costs.

Appeal allowed.

Original Jurisdiction (a).

Original Suit, No. 15 *of* 1862.

JEYASAṄKIRA-DEVI *against* NAGANNA'DA-DEVI.

Act VIII of 1859 sec. 313 does not apply where a reference is agreed to at and during the hearing.

1862. Dec. 10, 11. O. S. No. 15 of 1862.

DURING the hearing of this case the parties agreed to refer all matters in dispute between them to arbitration. Thereupon a question was raised as to whether, under Act VIII of 1859, sec. 313, it was necessary to file a written authority to apply for an order of reference.

Act VIII of 1859, sec. 312 empowers the parties to apply for such an order, and sec. 313 provides that "the application shall be made by the parties in person or by their pleaders specially authorized in that behalf by an instrument in writing, which shall be presented to the Court at the time of making the application, and shall be filed with the proceedings in the suit."

SCOTLAND, C. J.:—We think that section 313 applies where the case is not before the Court and being finally heard at the time of making the application; and that it does not properly apply when the reference is agreed to by all the parties present in open Court at and during the course of the final hearing. No written authority therefore need be filed.

BITTLESTON, J. concurred.

Branson for the plaintiff.

The Advocate General and *Arthur Branson* for the defendants.

(a) Present Scotland, C. J. and Bittleston, J.

Appellate Jurisdiction (a)

Special Appeal No. 419 *of* 1862.

MUHAMMAD 'ALI' BA'VA' LABBI, and another...*Appellants.*
MOHIA'DI'N NAINA'R and others..................*Respondents.*

The mere possession by one person of another's land does not render the former liable to account for the profits. For these he is liable only where he has held tortiously, or under an agreement, express or implied, to make them good.

THIS was a special appeal from the decree of R. R. Cotton the Civil Judge of Madura, in Cross-Appeal-Suits Nos. 32 and 33 of 1862, and from the decree of Maulaví Sayyid Muhammad Muṣtafá Sáhib, the Mufti Ṣadr Amín of Madura, in Original Suit No. 315 of 1860. In this suit the plaintiffs prayed for a decree prohibiting the defendant's interference with their enjoyment of eight kalams, three markáls, and three paḍis of nañjey land (yielding an annual produce of rupees 222-12-0, paying a kist of rupees 5-14-3 and situate in the village of Rannattan), and adjudging the defendants to pay to the plaintiffs rupees 1,745-2-6 the loss of produce and interest thereon, and also to hand over to the plaintiff certain jewels or the value thereof.

1862. *December* 11.
S. A. No. 157 *of* 1862.

Saḍagópáchárlu for the appellants, the defendants.

Tirumaláchárlyár for two of the respondents the first and third plaintiffs.

The Court delivered the following

JUDGMENT:—The plaintiffs represent, that they left their country in the year 1846, and that in 1852, during their continued absence, the first defendant received charge of their property, consisting of land and moveables, from their mother. They also state that part of the property has been returned to them, and they sue for the residue, together with produce realized from the land in the meantime.

(a) Present Strange and Frere, J J.

1862. December 15. S. A. No. 127 of 1862.

The Muftí Ṣadr Amín has awarded the land sued for, but has disallowed the other items.

From this decree both parties appealed, on which the Civil Judge altered the Ṣadr Amín's decree by awarding also the produce demanded.

The mere possession of the land by the defendants does not render them liable to refund the profits thereof. They held the land by consent, and under no condition to make good these profits. The plaintiffs, consequently, are without power to compel them to account for these profits, for which they could only be liable had they held possession under an express or implied agreement to make them good, or as wrong-doers.

We therefore disallow the produce. We further require the plaintiffs to pay the costs of the appeal which they instituted, as also those of this special appeal.

Appeal allowed.

NOTE.—Where there is a mere *bonâ fide* adverse possession English courts of equity do not carry back the account beyond the filing of the bill (*Pulteney* v. *Warren*, 6 Ves. 93: *Hicks* v. *Sallitt*, 3 De G. M. & G. 813), unless there has been a demand of possession by the plaintiff before bill filed, or acts equivalent thereto (*Penny* v. *Allen*, 7. De G. M. & G. 409, 428). But where the equitable owner is guilty of laches, the account will be carried back only to the filing of the bill (*Schroder* v. *Schroder*, Kay 591); and in one case, where the laches was great, an account was not directed beyond the date of the decree (*Acherley* v. *Roe*, 6 Ves. 565, 573 per Lord Loughborough). See Lewin's *Law of Trusts and Trustees*, 4th ed. 579.

Appellate Jurisdiction (a)

Special Appeal No. 37 *of* 1862.

NALLATAMBI PATTAR..................*Appellant.*
CHINNADEYVANA'YAGAM PIḶḶAI......*Respondent.*

Lands forming part of the endowment of a temple were demised by the Collector at a svámibhogam rent of four annas per kóṭṭai, the lessee paying the Government tírvai. The lessee entered, improved, and paid his rent for several years :—*Held,* reversing the decree of the Principal Ṣadr Amín, that the smallness of the rent shewed that the lessee was merely a tenant at will, and that the hakdár of the endowment, having regained possession, might oust him at his pleasure.

Reg. V of 1822 sec. 8 refers only to zamíndárs and other proprietors of estates permanently settled under the Regulations of 1802.

1862. *December* 11. *S. A. No.* 37 *of* 1862.

THIS was a special appeal from the decree of Kristnasvámi Ayyá, the Principal Ṣadr Amín of Tinnevelly, in Appeal Suit No. 506 of 1861, reversing the decision of Danakóḍi Mudaliyár, the District Munsif of Nellaiyambalam, in Original Suit No. 530 of 1861.

Saḍagópácharlu for the appellant, the defendant.

The plaintiff did not appear.

The facts sufficiently appear from the following

JUDGMENT :—This was a suit for the recovery of lands from which the plaintiff alleged that he had been forcibly ousted in the year 1860 by the defendant, who is the hakdár or proprietor of a temple-endowment at Melpálaiyam in the district of Tinnevelly. The plaintiff's statement is that in the year 1855, when the endowment was under the temporary charge and management of the collector, the plaintiff obtained a paṭṭá from that officer, authorizing him to cultivate the lands in question, on payment of a svámibhogam rent of four annas per kóṭṭai, in addition to the Government tírvai or tax; that he undertook the cultivation on these terms, and effected improvements on the land at a considerable expense; but that the defendant, on resuming possession of the endowment, wrongfully ousted him from possession.

(a) Present Strange and Frere, J J.

1862. December 11. S. A. No. 37 of 1862.

The answer of the defendant is to the effect that the plaintiff held under no permanent title, and that the defendant was fully justified in taking possession.

The District Munsif, who tried the case in the first instance, observed that the grant from the Collector, under which the plaintiff originally took possession, conveyed no permanent title, and accordingly dismissed the claim with costs. He was further of opinion that the plaintiff had wholly failed to prove the forcible usurpation alleged in the plaint. On appeal the Principal Ṣadr Amín reversed this decision, and gave judgment for the plaintiff. This officer concurred with the District Munsif in holding that the lease by the Collector to the plaintiff in 1855 was a mere temporary arrangement, and could not be construed as conveying to the plaintiff any right of permanent tenancy at the low rate of rent therein specified. The Principal Ṣadr Amín, however, declared the plaintiff to be entitled to possession of the lands on condition of paying to the defendant, his landlord, a svámibhogam rent of 3½ kóṭṭais of paddy annually for each kóṭṭai of land, being the highest rate imposed on similar lands in the village, of Melpálaiyam.

The Principal Ṣadr Amín further observed that the defendant, if hereafter desirous of ousting the plaintiff, should proceed against him in the manner indicated in the Regulations of 1802, and in section 8 of Regulation V of 1822.

The defendant preferred a special appeal against this decree.

We concur in the opinion of the Principal Ṣadr Amín as respects the nature of the lease by the Collector in 1855. It was manifestly of a temporary character only, and could not bind the defendant, on regaining possession of the village, to adhere to the very favourable terms on which the lands were then provisionally granted to the plaintiff. The plaintiff was thus a mere tenant at will, liable to ejectment at any time at the pleasure of his landlord, the defendant.

The Principal Ṣadr Amín seems to have considered that in taking steps to eject the plaintiff, the defendant was bound to follow the course indicated in section 8 of Regulation V of 1822, by applying to the revenue authorities. We cannot concur in this view, nor are we of opinion that the defendant had even the option of taking such a step, for he cannot be held to be a proprietor of land within the meaning of that section, which has reference only to zamíndárs or other proprietors of estates permanently settled under the Regulations of 1802.

1862.
December 11.
S. A. No. 37 *of* 1862.

In the present case it is expressly found by the lower Courts that no forcible ouster has been proved. The plaintiff seems rather to have retired peaceably at the instance of the defendant, his landlord; who, as before declared, is legally entitled to possession.

We therefore reverse the decree of the Principal Ṣadr Amín and confirm that of the District Munsif. The costs incurred by the defendant in the appeal and special appeal suits will be paid by the plaintiff.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 157 *of* 1862.

SHAIKH RAUTAN.......................*Appellant.*
KADANGOT SHUPAN...................*Respondent.*

A káṇam mortgagee does not forfeit his right to hold for twelve years from the date of the káṇam by allowing the porapád to fall into arrear.

1862. *December* 11. *S. A. No.* 157 *of* 1862.

THIS was a special appeal from the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 757 of 1860.

The plaintiff sued for the redemption of lands in Malabar which, on the 12th July 1854, he had demised to the first and second defendants on a káṇam mortgage. The porapád was paid down to 1856-1857, but not subsequently, and the plaintiff also sued for the arrears of this porapád. The defendants pleaded that they could not be ousted until after the lapse of twelve years from the date of the mortgage. The Mufti Ṣadr Amín and the Civil Judge both decreed for the plaintiff.

Tirumalácháriyár for the appellant, the first defendant.

Saḍagópáchárlu for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—We do not concur in the opinion of the courts below that by falling into arrears of porapád or net-rent the defendants forfeit their tenure of twelve years under the káṇam mortgage obtained by them, a tenure which, by the established usage of Malabar, is their right. The non-payment of such rent is a circumstance not affecting this tenure, as the mortgagor can have an independent remedy, either by suing for the rent, or debiting the sum thereof against the mortgage.

We therefore, being of opinion that the defendants cannot be ejected until after the lapse of twelve years from the 12th of July 1854, the date of their mortgage, modify the decrees of the lower courts, in this respect, and dismiss

(a) Present Strange and Frere, J J.

the plaintiff's claim so far as it relates to the ejectment of the defendants. The award of rent to the plaintiff, for which these decrees also provide, will remain undisturbed. All the costs of the suit will be paid by the plaintiffs.

1862.
December 11.
S. A. No. 157 *of* 1862.

NOTE.—The same point was decided in the same way on March 7, 1863, by Frere and Holloway J J., in Special Appeal No. 84 of 1862, *Kunju Velan* and others, appellants, *Manavikráma Zamorin Rája* and another, respondents, from the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 613 of 1860.

Sadagópáchárlu for the appellants, the 2d, 3d, 4th and 5th defendants, referred to *Special Appeals* Nos. 48, 131 and 157 of 1862.

Tirumaláchárlyár for the respondents, the 2d and 3d plaintiffs.

Miller for the 2d plaintiff.

The following is an extract from the judgment:—

The decree of the Civil Judge in this case is founded on the supposed rule that a janmam proprietor is entitled to oust a kánam mortgagee simply for non-payment of porapád or net rent. This opinion has, however, been declared by the High Court to be erroneous. The mortgagee in such cases is entitled to the occupation of the property for the usual period of twelve years from the date of the mortgage, notwithstanding such default; and the proprietor in the meantime may recover the arrears by suit, or take credit for the amount on paying off the kánam mortgage after the lapse of twelve years.

So in Special Appeal, No. 111 of 1862, *Krishna Mannadi* and others appellants, *Shankara Manaven* and another respondents, heard on Jan. 15, 1802, present Strange and Frere J J., the Court affirmed Special Appeal No. 157 of 1862, and observed:—" We have now again referred to the written opinions of those best qualified by experience and otherwise to form a judgment on the subject, and find that they fully support this view. And from a statement transmitted by the late Madras Sadr Court with their proceedings of the 5th August 1856 for revision by the judicial authorities of Malabar, it appears that the officers now occupying respectively the position of Civil Judge and Principal Sadr Amín of Calicut fully assented to the doctrine then expressed in the statement, which was identical with that now held by the High Court. The injustice of an opposite rule can scarcely be made more apparent than by the facts of the present case, in which the kánam mortgage advanced by the mortgagee now represented by the sixth defendant, amounts to the large sum of rupees 618-13-9, with the addition of a further claim for value of improvements; but the arrears of porapád, for non-payment of which the Civil Judge has declared the sixth defendant to be liable to ejectment, amount to the sum of rupees 3-11-6 only; and the sixth defendant has throughout declared his willingness to pay this sum, if the plaintiff will consent to receive it."

Appellate Jurisdiction (a)

Referred Case No. 7 *of* 1862.

ANNA'SVA'MI *against* NARRANAIYAN.

Where a mortgage-bond contained an agreement to repay the money with interest by a certain day, and proceeded thus "if I (the mortgagor) fail to pay the amount, then I will put you in possession of the land, and you may enjoy it; and when I have the means I will redeem the land and pay the debt with interest and take back the bond":—*Held* that on the mortgagor's default the mortgagee might sue for the money, and that he was not bound to accept the land and forego his right of action.

1862. *Dec.* 16, 17. *R. C. No.* 7 *of* 1862.

THIS was a case referred for the opinion of the High Court by R. B. Swinton, Judge of the Small Causes Court of Tanjore.

The facts sufficiently appear from the following judgment, which was delivered by

SCOTLAND, C. J.:—The plaintiff brought his suit for recovery of money upon a bond. In this instrument there occurred the following provision:—

" I (the defendant) agree to repay the same (the money " lent) with interest within the 30th Vaikási of Durmati " (10th June 1861), and if I fail to pay the amount, then " I will put you in possession of the land (mortgaged " for the debt) and you may enjoy it; and, when I have " the means, I will redeem the land and pay the debt with " interest and take back the bond."

The Judge of the Court of Small Causes at Tanjore puts the question for the consideration and decision of the High Court, " whether or not the plaintiff was bound to " sue for possession of the land upon the failure of defend- " ant to pay the debt, or whether he was at liberty to sue " for the money?" and he has decreed in the plaintiff's favour for the money sued for, contingent upon the High Court's judgment on the aforesaid point of law.

We consider the plaintiff entitled to enforce the obligation for payment of the money of which the defendant had made default in payment within the time named. The

(a) Present Scotland C. J. and Strange, J.

provision in the bond, allowing of the defendant placing the plaintiff in temporary possession of the land, is not a condition of a compulsory nature, binding the plaintiff to accept the land and forego his right to sue for the money, on failure of payment within the stipulated time. The latter right remains absolutely in the plaintiff, notwithstanding the said provision; and the Judge of the Court of Small Causes has properly determined that the defendant shall pay the money due by him to the plaintiff.

1862. Dec. 16, 17. R. C. No. 7 of 1862.

Appellate Jurisdiction (a)

SABA'PATI MUDALIYA'R *against* NA'RA'YANSVA'MI MUDALIYA'R.

Where an action on a contract was brought in the High Court and judgment was given to the plaintiff for rupees 454-13-4:—*Held* that as the amount so found due was less than rupees 500 the plaintiff could not have his costs, unless the judge who tried the cause certified that the action was fit to be brought in the High Court.

The 37th clause of the Letters Patent constituting the High Court does not give the Court an uncontrouled discretion as to costs in civil suits.

Act IX of 1850(*b*) sec. 101 is not repealed.

A special enactment is not impliedly repealed by a subsequent affirmative general enactment if the two enactments are not so repugnant as to be incapable of standing together.

1862. Dec. 16. 17.

THIS was an appeal by the plaintiff against the decree of Mr. Justice Bittleston in the suit of P. Sabápati Mudaliyár against R. Náráyansvámi Mudaliyár. The plaintiff claimed payment of rupees 601-5-4 for principal and interest secured by an instrument of mortgage in Tamil, dated the 10th of July 1854. The case came on before Mr. Justice Bittleston for settlement of issues. The defendant admitted the borrowing of the principal, the execution of the mortgage and the correctness of the particulars of the plaintiff's claim; but, although no part of the principal had been repaid, the defendant contended that he was entitled to counter-interest on his payments of interest, under a clause in the mortgage-instrument, of which the following is a translation: "When the rupees I pay in small instalments amount to one hundred, then [at the rate of] one on every

(*a*) Present Scotland, C. J. and Bittleston, J.

(*b*) An Act for the more easy recovery of small debts and demands in Calcutta, Madras and Bombay.

1862. Dec. 16, 17.

one hundred you are to allow counter-interest." The payments of interest amounting to more than rupees 100, Mr. Justice Bittleston allowed the claim for counter-interest, and consequently found the amount due to the plaintiff to be only rupees 454-13-4. For this sum judgment was given. The plaintiff thereupon applied for costs, but his lordship doubted whether, as the amount found due was less than 500 rupees, he had any power to grant costs, unless he could certify in the terms required by Act IX of 1850 sec. 1850, which in this case he considered he could not do. "The question," said his lordship, "turns upon the effect of section 11 of 24 & 25 Vict. c. 100, taken together with sections 12 and 37 of the Letters Patent constituting the High Court. It was not fully argued before me, and is one which I should have referred for decision to two Judges, but that I understood that the plaintiff was prepared to appeal from my decision if I should refuse to grant the costs. On the 15th of November therefore I gave judgment in accordance with the view which I at first took of the question, refusing the costs, so that on appeal the matter may be fully argued."

The sections and clauses referred to in the argument and judgment are as follows:

Act VIII of 1859 sec. 187 :—" The judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or what proportion; and the Court shall have full power to award and apportion costs in any manner it may deem proper."

Act IX of 1850 sec. 101 :—" If any action shall be commenced after the passing of this Act in the Supreme Court, for any cause other than those lastly hereinbefore specified, for which a summons might have been taken out from a Court holden under this Act, and a verdict shall be found for the plaintiff for a sum less than 500 rupees, if the said action is founded on contract, or less than 100 rupees, if it is founded on wrong, the plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either

case the Judge, who shall try the cause, shall certify on the back of the record that, by reason of the difficulty, novelty or general importance of the case, or of some erroneous course of decision on like cases in the Court of Small Causes, the action was fit to be brought in the Supreme Court."

Stat. 24 & 25 Vict. c. 104 sec. 11 ('An Act for establishing High Courts of Judicature in India') :—" Upon the establishment of the said High Courts in the said Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council, or charters, or of any Acts of the legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the judges of those Courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council."

Letters Patent constituting the High Court, clause 12 :—" And We do further ordain that the said High Court of Judicature at Madras, in the exercise of its ordinary original Civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court, except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

Ibid., clause 37. "And We do further ordain that the proceedings in all matters coming before the said High Court of Judicature at Madras, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating

1862. Dec. 16, 17.

to the granting of probates and letters of administration contained in the aforesaid Letters Patent of His Majesty King George the Third and by such further or other rules in respect thereof as are now in force; and that the proceedings in all matters coming before the said High Court, in the exercise of its matrimonial jurisdiction, shall be regulated as nearly as may be, by the rules and proceedings of Our Court for Divorce and Matrimonial Causes in England: and that save as hereinbefore in this clause otherwise provided, the proceedings in Civil suits of every description between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor General in Council, and being Act No. VIII of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as are now in force; Provided always, that the regulation of such proceedings respectively shall be subject to such laws and regulations as shall be hereafter made by the Governor in Council in relation to such proceedings respectively."

Stokes, for the plaintiff, in support of the appeal.

First, the instalments mentioned in the clause in the mortgage-instrument providing for counter-interest can only be taken to mean instalments of principal. Otherwise they must, as the defendant contends they do, mean instalments of interest and principal or of interest alone. But it can hardly be supposed that the parties intended the mortgagee to pay interest on his own interest, especially as then, if the mortgage-security lasted long enough, the counter-interest would necessarily amount to more than the interest paid him. The Court is not asked to insert words which are not in the instrument, but only to construe the words of the instrument in a manner most agreeable to the meaning of the parties, *Smith* v. *Packhurst*(a). If, then, the counter-interest was only payable on instalments of principal it never became due at all: Mr. Justice Bittleston should not have allowed the claim in respect of it; the plaintiff would have been entitled to judgment for more than 500 rupees; and the power to grant costs was not restricted by the provision in Act IX. of 1850 requiring the judge to certify.

(a) 3 Atk. 136 per Willes C. J. See *Wight* v. *Dickons* 1 Dow 147 and the cases cited in the note to *Roe* v. *Tranmarr* 2 Smith L. C. 5th ed. 453.

Secondly. Even though the plaintiff were only entitled to judgment for less than 500 rupees, the Court has now an uncontrouled discretion as to costs. Section 101 of Act IX of 1850 does not apply, for it is inconsistent with the 37th clause of the Letters Patent establishing the Madras High Court (or rather with sec. 187 of Act VIII of 1859 which is incorporated by that clause with our charter), and is therefore, under 24 and 25 Vict. c. 104 s. 11, inapplicable to cases like the present. 1862. *Dec.* 16, 17.

Cur. adv. vult.

SCOTLAND C. J.:—[After expressing his dissent from *Stokes'* argument against the allowance of counter-interest, and observing that the Court had no authority to insert the words "of principal" in the mortgage-instrument, proceeded as follows:] The question we are called on to decide in this case turns upon the construction to be put on the 37th clause of the Letters Patent establishing the High Court of this presidency. The case is not simply that of a subsequent Statute or Act of the Legislative Council providing in general terms in respect of a matter as to which there was in force at the time a previous special legislative enactment. Both Acts, Act VIII of 1859 and Act IX of 1850, were independently in full force as respects all their provisions, before the Letters Patent came into operation, and the question is whether the latter part of Clause 37 of the Letters Patent, providing for the regulation of the procedure in civil suits, has the effect of giving an uncontrolled discretion as to costs in such suits, and of thus indirectly repealing the provision contained in section 101 of Act IX of 1850? The clause in question does not provide that the Code of Civil Procedure shall alone regulate the proceedings in civil suits. They are to be regulated also by 'such further or other enactments of the Governor General in Council in relation to Civil procedure as are now in force.' And if it had been the intention of the framers of the Letters Patent that the provision as regards costs in the Small Cause Court Act (which was clearly an enactment then in force relating to civil procedure) should no longer be acted upon, it is reasonable to suppose that there would have been some express provision *December* 17.

1862. December 17.

to that effect, and that they would not have left their intention to be carried into effect in the indirect way now suggested.

This observation derives additional weight from a consideration of clause 12 of the Letters Patent, which contains an express provision doing away with the concurrent jurisdiction that before existed and all discretion as regards costs, in suits for sums under one hundred rupees.

But though such may not have been the intention of the framers of the Letters Patent, still, if giving to the language of the 37th clause its ordinary meaning, it necessarily has the effect of rendering sec. 187 of Act VIII of 1859 a repeal of sec. 101 of Act IX of 1850, we must so construe it. But we think this is not the necessary effect of the clause, and that the 101st section of the latter Act remains in operation, notwithstanding the affirmative general words of the 187th section of the former Act, in accordance with what must have been, we think, the real intention of the framers of the Letters Patent. The Code of Civil Procedure is, no doubt, to be taken as the governing law, and if the two sections in question could not reasonably have concurrent operation, the 187th section of the Code would alone regulate the question of costs. But upon every principle of construction, and according to the authority of decided cases, we ought not, in considering the language of the 37th clause of the Letters Patent, to construe the affirmative general enactment in the Code as impliedly a repeal of the special enactment in the Small Cause Court Act, if the latter is not so contrary to and inconsistent with the former that the two may not stand together, there being nothing otherwise to shew that such was the intention of the framers of the Letters Patent. Section 187 of Act of 1859 is one amongst others providing for the mode in which a judgment and decree in a suit are to be given, and in general terms confers upon the Court power to award and apportion costs in its discretion. No doubt the words are large enough to include the costs in every suit, whatever the amount. But that does not necessarily make it so contrary to, or inconsistent with, the provisions in the Small Cause Court Act as that the two cannot stand together. The former jurisdiction

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of the Small Cause Court under this Act is left just as before, except that as regards suits in which the debt or damage or value of the property does not exceed 100 rupees the concurrent jurisdiction of this Court is taken away; and the reasons for the provision as regards costs in cases still within the concurrent jurisdiction of the Court remain the same. We think, then, that effect may reasonably be given to both sections consistently with each other, and that the general discretionary power conferred by section 187 of the Code of Civil Procedure should be considered as subject to and regulated by the special provision of the Small Cause Court Act, in suits with respect to which there is a concurrent jurisdiction. In this way both sections have a reasonable operation given to them without any contrariety or repugnancy.

BITTLESTON, J. concurred.

Appeal dismissed.

NOTE.—See *Gregory's* Case, 6 Rep. 19 *b*: *Lyn* v. *Wyn* Bridg. 122: *Darcy's Case,* Cro. Eliz. 512: *Foster's Case,* 11 Rep. 63: 15 East 377. *Paget* v. *Foley,* 2 Bing. N. C. 679; *Rex* v. *Middlesex Justices* 2 B. and Ad. 818: *Reg.* v. *Inhabitants of St. Edmunds* 2 Q. B. 84: *The Dean of Ely* v. *Bliss* 5 Beav. 574, 582 per Lord Langdale M. R: S. C. on appeal 2 D. M. & G. 459; see p. 470: *Brown* v. *Mac Mullin* 7 M. & W. 196: *Crisp* v. *Burmby,* 8 Bing. 394, and the late case of *Green* v. *Jenkins* 1 DeG. F. & J. 454, 469, where Lord Campbell C. said "There may certainly be an implied as well as an express, repeal of existing laws by new laws—but that is where the new and the old laws are conflicting and cannot stand together. "Leges posteriores leges priores contrarias abrogant." But if there is no express repeal and the old and the new laws may both be operative, the old remain in force."

Appellate Jurisdiction (a)

Special Appeal No. 380 *of* 1862.

EDATHIL ITTI and others...............*Appellants.*
KO'PASHON NA'YAR.....................*Respondent.*

A káranavan singly may make an otti mortgage.

Semble, an otti mortgage cannot be redeemed until after the lapse of twelve years from its date.

1862. *December* 15. *S. A. No.* 380 *of* 1862.

THIS was a special appeal against the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 1 of 1861, reversing the decree of the District Munsif of Palghát, in Original Suit No. 172 of 1858. The lands, the subject of the suit, were the janma property of the tarawád of which the first and second plaintiffs and the fourth defendant were members. In 1843 their then káranavan demised the lands to the káranavan of the first, second and third defendants on a kánam of 1,000 panams. In 1857-58 the first and second plaintiffs and the fourth defendant assigned the land on mélkánam to the third plaintiff, and at the same time directed the first defendant to give up the lands, together with the míchavâram, to the third plaintiff. The object of the present suit, which was commenced on the 7th of April 1858, was to compel the surrender of the lands to the plaintiff on payment by him of the 1,000 panams.

The first, second and third defendants admitted the demise on kánam, but pleaded that in 1859 the fourth defendant (who had in the meantime become káranavan of the first and second plaintiffs) executed an otti mortgage of the premises to the third and fifth defendants, that the land were now held under that mortgage, and that those defendants could not be ousted within twelve years from the daté thereof.

The District Munsif of Palghát, suspecting the genuineness of the otti mortgage, decreed in favour of the plaintiffs. The Civil Judge held the otti deed valid and reversed the Munsif's decree. The plaintiffs now appealed against this reversal.

Káranágara Mananan for the appellants, the plaintiffs, cited *Special Appeal No.* 44 *of* 1855.

Miller for the respondent, the first defendant.

(a) Present Scotland. C. J. and Strange, J

1862. December 15. S. A. No. 380 of 1862.

SCOTLAND, C. J.—The question raised is one purely of local usage. The plaintiffs contend that the fourth defendant, the káraṇavan of the first and second plaintiffs, had no power *singly* to create an otti-right; for that this in effect amounted to an absolute sale. If that were so, the objection would be well founded, for a sale of family property in Malabar requires that the senior anandravan should (if sui juris) concur in the conveyance. But though after an otti-right is granted, little or nothing is left to the janma proprietor, he has still a distinct right to redeem, and the transaction must therefore be regarded as a mortgage, and not as an absolute sale. If, then, an otti-right is a mortgage-right, a káraṇavan may singly create it for proper reasons, which, of course, we must assume to have existed in the present case.

Then it is said that the property is sthánam, and could not therefore be alienated so as to bind the successor. But this point cannot be raised on this special appeal, for there was no evidence that the premises were sthánam.

Lastly, a question was raised by the plaintiffs' vakíl as to whether the plaintiff should not now be allowed to redeem. We might get rid of this on the ground that an otti-right entitles the mortgagee to hold without redemption for twelve years from the date of the mortgage: Mr. Justice Strange is strongly of opinion that this is so, and I have no doubt that he is right. But we ought not in giving a decision to travel out of the four corners of the case. And as the facts do not sufficiently raise the question, which is one purely of local usage, it is enough to say that the plaintiff cannot now be allowed to maintain that he is entitled to a decree in this suit for redemption of the otti mortgage.

STRANGE, J. concurred.

Appeal dismissed.

NOTE.—In *Special Appeal No.* 101 *of* 1862, heard March 21, 1863, present Strange and Frere, J J., *Mayne* for the appellants, *Tirumalácháriyár* for the respondents, the High Court expressly ruled that an otti mortgage was irredeemable before the lapse of twelve years from its date.

Appellate Jurisdiction (a)

Regular Appeal No. 63 of 1861.

Garuḍa Reḍḍi .... *Appellant.*
Guḍi Janakayya Ga'ru .... *Respondent.*

Regular Appeal No. 66 of 1861.

Guḍi Janakayya Ga'ru .... *Appellant.*
Garuḍa Reḍḍi .... *Respondent.*

The defendant gave a bond on unstamped paper to the plaintiff's eldest brother. On the obligee's death the succession was disputed, and the obligor refused to pay the subsequent interest to the plaintiff:—*Held* that as the plaintiff had failed to take out a certificate of succession to the obligee, the obligor was justified in such refusal.

Held also that the plaintiff could not recover the stamp-penalty from the obligor.

The obligor having offered to pay the principal and interest into Court:—*Held* that he should be relieved from interest from the date of such offer.

1862. *December* 20. *RR. AA. Nos.* 63 *and* 66 *of* 1862.

THESE were regular appeals from the decree of T. J. Knox, the Civil Judge of Chikkáko'l, in Original Suit No. 74 of 1861.

Branson for the appellant, the plaintiff, in No. 63.

Sloan for Guḍi Janakayya Gáru in both appeals.

Garuḍa Reḍḍi did not appear in No. 66.

The facts appear from the following

JUDGMENT:—This was a suit on a bond for rupees 21,000, with interest at 7½ per cent., executed by the defendant on the 18th June 1852 in favour of the plaintiff's elder brother, Appalu Narasimulu Gáru, since deceased. It was admitted that interest had been paid on the bond up to 14th September 1854; and the plaintiff Garuḍa Reḍḍi accordingly claimed interest from the latter date at 7½ per cent., together with the amount of stamp-penalty, rupees 500, the bond having been executed on unstamped paper.

(a) Present Phillips and Frere, J J.

1862. December 20. RR. AA. Nos. 63 and 66 of 1862.

The defendant admitted the execution of the bond, but pleaded that after the death of the plaintiff's brother, the original obligee, the succession was in dispute between the plaintiff himself, and his nephew, the son of Appalu Narasumulu Gáru, and that he, the defendant, had been at all times ready to pay the sum due, if the plaintiff had produced a legal certificate of succession; as also that he had, on the 17th January 1856, further offered to pay the amount into Court.

The Civil Judge pronounced the defendant to be liable for the principal rupees 21,000, with interest at 7½ per cent. from the 14th September 1854 to the 17th January 1856, the date on which the defendant offered to pay the money into Court; and again at the same rate from the 23rd December 1860, at which time it was shown that the defendant had notice of the plaintiff's right, under a decree of the late Ṣadr Court, to receive the money as the heir and representative of his deceased brother the obligee. For the interval between the 17th January 1856 and the 23rd December 1860, the Civil Judge declared the plaintiff to be entitled to interest on his bond at a reduced rate of 4½ per cent., together with the amount of the penalty claimed rupees 500.

Both parties have appealed from this decree—the plaintiff in appeal No. 63 of 1861, in which he urges his title to recover interest at the full rate of 7½ per cent. stipulated in the bond for the time between 17th January 1856 and 23rd December 1860; and the defendant in appeal No. 66 of the same year, in which he requests that he may be relieved from payment of the penalty, as well as of interest for the same period.

We are of opinion that from the time when the succession was disputed, and the defendant consequently declined the payment to the plaintiff as the alleged heir of his deceased brother, it became the duty of the plaintiff to take out a certificate of succession, and that in the absence of any such authority, the defendant cannot justly be charged with interest which has accrued owing to the dilatory conduct of the plaintiff himself. Nor can the penalty be recovered in equity. Both parties have united

1862. December 20. RR. AA. Nos. 63 and 66 of 1862.

in endeavouring to evade the law, which prescribes the use of a stamp on such occasions, and to decree the reimbursement of the amount to the plaintiff would be contrary to the policy of law which governs such questions.

The defendant has evinced throughout a perfect willingness to pay the sum due, on production of the proper authority for its receipt, and we consider therefore that he is entitled to his costs.

We therefore dismiss the plaintiff's appeal No. 63 with costs, and in accordance with the request of the defendant in the appeal No. 66, relieve him altogether from payment of interest on the bond from the 17th January 1856 to the 23rd December 1860, as well as of the penalty. The substantial provisions of the original decree will in other respects remain undisturbed; but the plaintiff must pay the costs in both suits original and appeal.

Regular Appeal No. 63 *of* 1861 *dismissed.*

Regular Appeal No. 66 *of* 1861 *allowed.*

Appellate Jurisdiction (a)

Referred Case No. 8 *of* 1862.

ANONYMOUS.

On the day fixed for the hearing of a suit in a Court of Small Causes the plaintiff's vakíl appeared and stated on behalf of his client that the defendant had satisfied him in respect of the matter of the suit, which he prayed might be dismissed. The defendant did not appear :—*Held,* that the Judge was right in dismissing the suit, but that he should have recorded an order under the first provision in sec. 98 of Act VIII of 1859.

Held also that in such a case, when the plaintiff applies for a return of stamp duty, he must strictly bring himself within the subsequent part of the same section as modified by sec. 26 of Act X of 1862.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Small Causes Court of Tanjore.

1862. *December* 22. *R. C. No.* 8 *of* 1862.

The facts appear from the following judgment, which was delivered by

SCOTLAND, C. J.:—It seems in this case that the plaintiff's duly authorized vakíl appeared in Court on the day fixed for the hearing and stated on behalf of his client that the defendant had satisfied him in respect of a bond debt, the subject-matter of the suit, by payment of the amount sued for, and prayed that the suit might be dismissed; and that there was no appearance on the part of the defendant. No reason appearing why the Judge should do otherwise than rely upon the vakíl's statement, it was quite regular, under the circumstances, to entertain the application, and this being granted, we are of opinion that the Judge should, under the first provision in section 98 of Act VIII of 1859*(b)*, have re-

(*a*) Present Scotland, C. J. and Frere, J.

(*b*) Act VIII of 1859, section 98 enacts that "if a suit shall be adjusted by mutual agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise, or satisfaction shall be recorded, and the suit shall be disposed of in accordance therewith. On the application of the plaintiff reciting the substance of such agreement, compromise or satisfaction, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorizing him to receive back from the Collector the full amount of stamp-duty paid on the plaint if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues and before any witness has been examined. Provided however that no such certificate shall be granted if the adjustment between the parties be such as to require a decree to pass on which process of execution can be taken out."

1862. December 22. R. C. No. 8 of 1862.

corded an order to the following effect:—That it appearing upon the day fixed for the hearing of the suit, by the statement in open Court of the plaintiff's vakíl, that the plaintiff acknowledged himself to be satisfied by the defendant in respect of the matter of the suit, by payment of the amount sued for, and there being no appearance by or on behalf of the defendant, the Court accordingly declares the suit to be fully satisfied, and orders that the same be put an end to, and that the defendant be thereof wholly acquitted and discharged.

It may be necessary to add that when the plaintiff makes a further application, with a view to the return of the stamp-duty, he must strictly bring himself within the subsequent part of the same section, as modified by section 26 of Act X of 1862(*a*).

(*a*) Act X of 1862, section 26 enacts that "in modification of so much of section 98 of the Code of Civil Procedure as declares that on the application of the plaintiff reciting the substance of any agreement, compromise, or satisfaction, in accordance with which a suit is adjusted and disposed of, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff, authorizing him to recover back from the Collector the full amount of the stamp-duty paid on the plaint, if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues and before any witness shall have been examined,—it is enacted that if such application shall have been presented before the suit is called up for the settlement of issues, or in suits in which the summons to the defendant shall be for the final disposal of the suit, as directed in section 41 of the same Code, and in section 9 of Act XLII of 1860 *(for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts established by Royal Charter)* before the hearing of the suit has commenced, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into, or made, shall grant a certificate to the plaintiff, authorizing him to receive back from the Collector half the amount of the stamp-duty paid on the plaint. Provided that no such certificate shall be granted if the adjustment between the parties be such as to require a decree to pass, on which process of execution can be taken out, or in any appealed suit."

Appellate Jurisdiction (a)

Civil Petition No. 131 *of* 1862.

Ex parte IMBICHI PA'TAMA.

An appeal will not lie against an order refusing to appoint a receiver under Act VIII of 1859 section 92.

THIS was an appeal by the plaintiff in a suit in the Civil Court of Calicut, against an order of the Civil Judge refusing to appoint a receiver under sec. 92 of the Code of Civil Procedure, Act VIII of 1859.

1862. *December* 22. *C. P. No.* 131 *of* 1862.

Mayne for the appellant.

Branson, for the respondent, took the preliminary objection that under the Civil Procedure Code a plaintiff could not appeal against an order refusing to appoint a receiver. He referred to sections 363 and 92 of Act VIII of 1859.

Mayne : A party has a right to appeal from a subordinate to a superior court unless the appeal be expressly taken away.

SCOTLAND C. J.—The objection cannot be got over. It is a general principle of law that no one is entitled to appeal unless the right to do so is clearly given him. Now section 363 of the Civil Procedure Code provides that "No appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree." Here we have general negative words; and unless the case comes within some specific affirmative provision there can be no appeal. Now all through the Civil Procedure Code the right of appeal against orders prior to decree, and subsequently to presenting the plaint, seems to be given only when such orders are made in favour of the plaintiff. Thus sec. 76 allows a defendant an appeal against orders to give bail and sec. 85 allows a defendant an appeal in cases of attachment before judgment. So sec. 94 declares that "any order made under either of the last preceding sections" (which relate respectively to the granting of in-

(a) Present Scotland, C. J. and Frere, J.

1862. December 22. C. P. No. 181 of 1862.

junctions and appointment of receivers) "shall be open to appeal by the defendant." Nowhere is an appeal against the refusal of such an order given to the plaintiff. And the negative words in section 363 preclude a right of appeal unless when such right is given by express words in the code.

FRERE, J. concurred.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 21 *of* 1862.

KONDAYYA GAUNDAN and another......*Appellants.*
RA'MA'SVA'MI GAUNDAN and another...*Respondents.*

Translations of papers, if required, should be applied for before the case is posted.

1862. December 22. R. A. No. 21 of 1862.

IN this case *Mayne*, for the appellants, applied that certain documents mentioned in the petition of appeal might be translated, and that the case might be postponed until this should have been done. The case had been posted on the 17th of December 1862.

SCOTLAND C. J. :—The case has been for some time posted, and does not appear to have been posted prematurely. Applications like the present should always be made before the posting. As, however, the Registrar says that no inconvenience will be caused, we will grant the application. But it must distinctly be understood that this is an exceptional case and not to be taken as a precedent.

FRERE, J. concurred.

Application granted.

(a) Present Scotland, C. J. and Frere, J.

Appellate Jurisdiction (a)

Special Appeal No. 63 *of* 1862.

NI'LA'TA'TCHI..........................*Appellant.*
VEṄKATA'CHALA MUDALI............*Respondent.*

When an appellate Court appears not to have taken into its consideration a presumption of fact arising out of the circumstances in evidence and materially affecting the decision of the case, that is such "defect" (Sec. 372, Act VIII of 1859), as the High Court will remedy on special appeal by directing an issue.

Special Appeal No. 701 *of* 1860 observed upon.

1862. *December* 22. *S. A. No.* 63 *of* 1861.

THIS was an appeal from the decree of E. W. Bird, Acting Civil Judge of Negapatam, in Appeal Suit No. 132 of 1861, reversing the decree of J. H. Shunker, the District Munsif of Tranquebar, in Original Suit No. 18 of 1859, in which the plaintiff sued for the recovery of vélis 2, maus 8 and gúlis 55½ being his one-sixth share in certain family property, with the appurtenances, for the registration in his name of the míráśí thereof, and for rupees 715 being the mesne profits from 1850.

The plaintiff alleged that he and the other members of his family divided all the family-property except the land in dispute, which was enjoyed in common down to 1849, and that this land had from 1850 been held by the first defendant's husband, (a stranger to the family) and after his death by the first defendant. He claimed one-sixth of of the land, and one-sixth of the produce from 1850.

The first defendant's case was that the plaintiff, his brother, and the defendants 2 to 6 were entitled to the property: that the third defendant and the sixth defendant's late husband were the managing members of the family, that the property was purchased by the first defendant's husband in 1850 from them; and that the plaintiff's share of the purchase-money was paid by the third defendant to the plaintiff's brother.

The District Munsif dismissed the plaintiff's claim, observing that the first defendant's bill of sale was shewn to have been lost, that the deed itself was proved by the copy

(a) Present Scotland, C. J. and Frere, J.

1862. December 22. S. A. No. 68 of 1862.

No. III, and by the *sammadipattiram(a)* No. 1; and that the third, the late husband of the sixth, and the seventh defendants were the managers.

On appeal, the Civil Judge reversed this decision, and recorded a judgment of which the following are the concluding paragraphs:—

"The points for decision in this case are whether the sale of the lands in issue by the third, sixth and seventh defendants, had or had not the consent of the plaintiff; and whether the original decree has decided the suit according to the evidence.

"The appellate court sees no reason to doubt that the land in issue was sold by the 3rd, 6th and 7th defendants to the 1st defendant's husband, but observes that the bill of sale, No. 3, has been improperly admitted as evidence of the fact. This document, No. 3, as being copy of a copy, was inadmissible. There is no proof on which the court can rely that the plaintiff was a consenting party to this sale. He is admitted to be a co-parcener of the vendors; is proved to have been of mature age at the date of sale; and had a right to one-sixth of the land. The plaintiff did not sign the bill of sale. Beyond the mere assertion of the 3rd defendant (1st defendant's 1st witness) there is nothing to show he was present at the sale, or that he received his share of the purchase-money, as alleged. There is no proof that he consented to receive the amount after his brother Ayyá Mudali arrived, as declared by the said 3rd defendant. The evidence of the defendant's 4th witness is of the vaguest kind, and undeserving of attention.

"Document No. 4, alluded to in the original decree, throws no light on the case at all. It is not proved. It is no authority whatever to the vendors to sell the plaintiff's family property, but only empowers the 6th defendant's husband to incur certain debts for the recovery of the lands, and gives him an interest in the net proceeds thereof, to enable him to clear off his claim. The plaintiff appears, moreover, to deny this document. His pleader during the appeal repudiated it.

(a) 'A deed of acquiescence, permission or agreement' Wilson: from Sanskr. *sammata* 'assented' and *patra* 'leaf.'

1862. December 22. S. A. No. 63 of 1862.

"The sale of the family-property having been made without the consent of the plaintiff, a co-sharer, is invalid to the extent of his share; which therefore must be made good to him as sued for. The produce claimed is proved to be due, and the defendants have in no way rebutted the plaintiff's claim on this point.

"The original decree is therefore reversed, and plaintiff declared entitled as sued for, with all costs. The produce to be made good by the party in possession of the land."

The first defendant appealed specially.

Branson for the appellant, the first defendant, contended that the plaintiff was barred by acquiescence from 1850, the date of sale, the suit not having been instituted till 1859; and cited *Special Appeals No.* 113 *of* 1860*(a)*, *No.* 92 *of* 1860*(b)* and *No.* 701 *of* 1860*(c)*.

Saḍagopáchárlu for the respondent, the plaintiff.

SCOTLAND, C. J.:—Were I sitting here to decide this question as a matter of fact, my impression is that my mind would incline strongly to the conclusion that there had been consent and acquiescence on the plaintiff's part. The sale takes place in 1850, and from that time to 1859, when the suit is instituted, the plaintiff lies by. He takes no step whatever. He knows that the defendant is in the enjoyment of the property and exercising acts of ownership over it—and yet he puts forth no claim for that long period of time. It appears to me that, under such circumstances, there was strong ground for the presumption of his having acquiesced in, and been a consenting party to, the sale.

If the defendants had put forward that they at the time of purchase paid to the plaintiff himself his one-fifth share of the purchase-money; had they relied upon that as proof of his consent; and had the Judge, totally disbelieving such a case, considered that his share had never been paid for, no inference from the mere lapse of time would have arisen. But such is not the case of the defendant here. His case is that the money was paid by her late husband to the managing members, and that the plaintiff's share was paid

(a) M. S. D. 1860, p. 258. (b) M. S. J. 1861, p. 37.
(c) Ibid. p. 145.

1862. December 22. S. A. No. 63 of 1862.

by them to the plaintiff's brother. So that the question remains whether or not the plaintiff knew of this and was a consenting party ?

This, however, is a question of fact, and we are not, in special appeals, judges of fact. We sit here trammelled by the provisions of the Civil Procedure Code, as applicable to such cases. And the question we have to consider is, whether there has been on this point a substantial error or defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits ? That a decision may be most materially affected by the exclusion from the mind of the Judge of a presumption arising out of the circumstances of the case, cannot, I think, be doubted; and here it appears to us, upon reading the appeal case and the judgment, that the learned Judge could hardly have dealt with the consideration of the transaction having occurred so far back as nine years before the institution of the suit, and the effect by way of inference on the plaintiff's claim resulting from this lapse of time. We cannot therefore, I think, say that there has not been a defect in the investigation of the case which may have affected the decision of the suit upon the merits. Under these circumstances the Court ought to submit the question to the Civil Judge—whether considering the inference arising from lapse of time, he comes to the conclusion that the defendant was or was not a consenting party to the sale ?

There is no ground for the argument that there is a presumption of law here. Lapse of time short of the period of legal limitation does not bind so as to exclude evidence in explanation. It is true that there are numbers of cases in equity, in which relief has been refused where the plaintiff has lain by a great many years. But in those instances the party has not been held to be absolutely estopped; but he has been refused relief where all the circumstances have been such as to establish laches or acquiescence. The lapse of time in this case is a strong circumstance tending to prove consent and acquiescence, and the Judge should give effect to it considered with the other satisfactory evidence offered in explanation.

Three cases have been referred to, and the last certainly does seem to lay down the law in such a way as to warrant

Mr. Branson's argument, that acquiescence is a binding presumption of law after the lapse of several years. But it would be difficult to apply such a doctrine. What is to be the time which is so to operate? There is no dividing time stated, and whilst in one case nothing may appear to account for the lapse of time, in another the same length of time may be shewn to be inconsistent with either consent or acquiescence. The decision referred to cannot, I think, be taken to amount to more substantially than this, that there was evidence in that case which showed acquiescence. If, however, it can be said to go beyond that, I cannot concur in it. In the two other cases cited, lapse of time appears properly to have been put as matter of evidence.

1862. *December* 22. *S. A. No.* 63 *of* 1862.

FRERE, J. concurred.

Issue directed.

Appellate Jurisdiction (*a*)

Civil Petition No. 130 *of* 1862.

Ex parte CHELLAPPERUMA'Ḷ PIḶḶAI.

A Muftí Ṣadr Amín may set aside an attachment in a suit issued from his court and no longer properly in force in the suit, although no express statutory power to do so exists.

But on a petition to set aside such an attachment, he cannot also make a declaration as to the right to the property attached and claimed to have been acquired subsequently, and direct that possession should be transferred to the petitioner.

THIS was a petition under section 35 of Act XXIII of 1861(*b*), against an order of J. W. Cherry, the Civil Judge of Salem, on Summary Appeal Petition, No. 135 of 1862.

1863. *January* 5. *Civ. P. No.* 130 *of* 1862.

It appeared that certain land in zil'a Salem had been taken on attachment pending a suit (No. 510 of 1830) respecting it in the court of the Muftí Ṣadr Amín. The suit

(*a*) Present Scotland, C. J. and Frere, J.

(*b*) This section enacts that the Ṣadr Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Ṣadr Court, if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and the Ṣadr Court may set aside the decision passed on appeal in such case by the Subordinate Court, or may pass such other order in the case as to such Ṣadr Court may seem right.

1863. January 5. Civ. P. No. 180 of 1862.

was dismissed for want of prosecution, but the defendant, the owner of the land, omitted to get the attachment removed, and died, leaving a son and heir the petitioner. Thereupon the defendant's widow, usurping a right to alienate, sold the property. The vendee remained in undisturbed possession for thirty years. The son, the legal heir, then petitioned the Muftí Ṣadr Amín of Salem to set aside the attachment and get back the property as having been illegally sold. The Muftí Ṣadr Amín made an order, not only setting aside the attachment, but also declaring that the widow had no right to sell, and that the petitioner should be put into possession of the land. On appeal the Civil Judge reversed this order so far as it related to putting the petitioner into possession.

Saḍagópáchárlu for the petitioner.

SCOTLAND, C. J.:—We are asked to exercise the general jurisdiction given to us by section 35 of Act XXIII of 1861; and if the appellate court below had no power to entertain the appeal, then it is clear that we may exercise the jurisdiction given by that section.

The first question then is, had the appellate court below jurisdiction to entertain the appeal? Now I am not aware of the existence of any provision giving the right to appeal against an order of the kind made by the Muftí Ṣadr Amín in the present case. On the contrary, section 364 of Act VIII of 1859 expressly negatives any right to appeal against an order like this made after decree, except as otherwise expressly provided; and I have vainly asked the learned vakíl for the respondent to point out any provision such as I have referred to. The conclusion is that the Civil Court had no such jurisdiction as it has assumed to exercise; and the case therefore comes within the jurisdiction given under section 35 of Act XXIII of 1861.

Then, the next question to consider is whether or not the Muftí Ṣadr Amín had power to make the order in question? Now, although there appears no express statutory power to set aside the attachment, he is certainly authorised to set aside an attachment issued from his court by mistake or on insufficient grounds or no longer properly in force in the suit. Otherwise an attachment might become the means

1863. *January* 5. *Civ. P. No.* 130 *of* 1862.

of inflicting the greatest injustice, instead of being, as it was intended to be, an useful means of enforcing legal rights. In such a case nothing can be more reasonable than that a party should be entitled to call upon the Court to relieve him from the prejudice of having a standing attachment against his property. It is clear, then, I think, that the Muftí possessed an incidental jurisdiction to set aside the attachment; and in the present case it was right and proper for him do to so. But the Muftí not only does this but something more. He not only sets aside the attachment, but goes on to direct that possession of the property shall be transferred to the petitioner. This was unquestionably *extra vires.* The Muftí should not have gone on to decide as to the widow's right to sell and the possession. He should merely have confined himself to setting aside the attachment. The petitioner cannot complain, for the application is made after the lapse of thirty years, and his laches in lying by for such a time is altogether his own.

As then the order of the Muftí Ṣadr Amín, so far as it declared the incapacity of the widow to sell, was clearly *extra vires,* we may, without setting aside the order *in toto,* direct that it shall stand so far as it sets aside the attachment; but that it shall be quashed so far as it was declaratory of the right to the property. I will only add that it seems very likely that this was an attempt to get rid of the statute of limitations, which will probably be relied on if a suit is brought for possession of the land.

FRERE, J. concurred.

Order modified.

Appellate Jurisdiction (a)

Session Case No. 95 *of* 1862.

THE QUEEN *against* SUBBAYYA GAUNDAN.

The High Court will not order a copy of the Judge's notes of the evidence and proceedings upon conviction in a criminal case to be furnished to the prisoner on the ground of alleged probable hardship. A fair *prima facie* case as to the irregularity of those proceedings, or the illegality or impropriety of the sentence or order, must appear, before the Court will call for or direct a return of the record of the proceedings.

1863. *January* 5. *S. C. No.* 95 *of* 1862.

AT the sitting of the Court, *Ritchie* applied for an order directing the Sessions Judge at Madura to furnish a convicted prisoner, for whom *Ritchie* appeared, with a copy of the record of the evidence and proceedings in the case. Such copy, he said, the Judge had refused, and he grounded his application on the hardship likely to result from persistence in such refusal.

SCOTLAND, C. J.:—We cannot order the Judge to grant a copy of the record merely on the ground of alleged probable hardship. The law provides that we may call for and examine the record of any case tried by the Court of Session*(b)*. But then there must appear to be at least a reasonable *primâ facie* ground as respects either the irregularity of the proceedings, or the illegality or impropriety of the sentence or order passed. It appears, however, that there is now no record kept but the Judge's notes: they are substituted for what was called the record. There can, we think, be no objection to your having a copy of these notes if, as stated, the prisoner is willing to pay for it, and it appears to be reasonably required. The Court will express its opinion that the Judge ought under such circumstances to allow a copy to be given: this opinion will be communicated by the Registrar; and we have no doubt the application of the prisoner, if renewed, will be complied with.

FRERE, J. concurred.

(*a*) Present Scotland, C. J. and Frere, J.

(*b*) Criminal Procedure Code (Act XXV of 1861) sec. 405.

Appellate Jurisdiction (a)

Referred Case No. 5 *of* 1862.

KRISTNA CHEṬṬI *against* BALA'RAMA CHEṬṬI and others.

The obligor's consent is not necessary to the assignment of a common money-bond.

THIS was a case referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore. 1863. *January* 5. *R. C. No.* 5 *of* 1862.

No counsel were instructed.

The facts appear from the following

JUDGMENT:—This is the case of a common money-bond given by the second defendant to Kristna Cheṭṭi, and by the latter *bonâ fide* and for good consideration absolutely assigned to the plaintiff, who thereupon sued to recover the amount secured by the bond. It appears that the second defendant (the obligor) objected, upon the hearing of the suit, that his consent was essential to the validity of the assignment, and no evidence was given of such consent; and the single question submitted for the opinion of the Court is, whether the Judge was right in deciding that proof of the obligor's consent to the assignment was not necessary to entitle the plaintiff to recover in the suit? We are of opinion that he was. The right of the obligee to assign was, in the absence of any express stipulation in the bond, quite independent of *subsequent* consent on the part of the obligor. Here, by the terms of the bond, Kristna Cheṭṭi possessed, as obligee, a general unqualified right to sue upon it for the amount secured; and he was at liberty, by a *bonâ fide* assignment, to transfer that right to the plaintiff.

(a) Present Scotland, C. J. and Frere, J.

Appellate Jurisdiction (a)

Referred Case No. 9 *of* 1862.

ANONYMOUS *against* MUTTUSA'MIYA PILLAI and another.

The obligee of a common money-bond of which a *boná fide* valid assignment has been made, is not liable to be made a defendant in a suit by his assignee to enforce payment of the bond and to a decree against himself jointly with the obligor.

1863. *January* 5. *R. C. No.* 9 *of* 1862.

THIS was a case referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted in this case for decision of the Court is, whether the obligee of a common money-bond, who had for a good consideration made a valid assignment to the plaintiff of all his right and interest under it, was afterwards properly made a defendant to a suit by the plaintiff (the assignee) to enforce payment of the bond, and liable jointly with the obligor to a decree against him? The Judge before whom the suit was tried has decided this question in the negative, and we are of opinion that he decided rightly. There are no special terms in the assignment: it simply assigns the bond and all right to sue upon it; and being in all respects *boná fide* and valid, the plaintiff's right of action upon the bond to enforce payment was against the obligor, and the obligor only. The right to the obligee's evidence is not affected by his not being made a party to the suit.

(a) Present Scotland, C. J. and Frere, J.

NOTE.—The same point was decided in *Referred Case No.* 10 *of* 1862.

Appellate Jurisdiction (a)

Special Appeal No. 15 *of* 1862.

SUBBARA'YULU NA'YAK..................*Appellant.*
RA'MA REḌḌI...............................*Respondent.*

Regulation XXV of 1802 strictly restrains the alienation of proprietary rights except in manner therein provided, and invalidates a disposal or transfer of such rights as against the Government and the heirs and successors of the proprietor making the disposal or transfer.

Semble such alienation would be valid against the proprietor himself.

A permanent lease is as much within the operation of the Regulations XXV and XXX of 1802 as an absolute transfer by gift or sale.

THIS was a special appeal from the decision of J. W. Cherry, the Civil Judge of Salem, in Appeal Suit No. 175 of 1860. 1863. *January* 5. *S. A. No.* 15 *of* 1862.

The principal ground of appeal was that a permanent lease, which had been upheld by the Civil Judge, was invalid as not being in accordance with clauses 2 and 3 of section 4 of Reg. XXX of 1832 (which provide that "Paṭṭás and muchalkás shall contain the date of the month, and the year on which they may be executed; the names and situation of the contracting parties" and that "Paṭṭás for village-rents shall contain the names of the village, the extent of the land therein, the amount of the rent per annum, the period of the kists which proprietors or farmers of land shall be compellable to adjust according to the time of reaping or of selling the produce of the land and the coin in which the rent is to be paid"), nor with section 5 of the same Regulation, which enacts that "Paṭṭás and muchalkás shall be regularly required and registered by the karaṇam of the village in which the land engaged for are situated."

Branson for the appellant, the eighth defendant, cited *Special Appeal* No. 210 of 1861*(b)*, and referred to the clauses and section above set out, and also to the following sections of Reg. XXV of 1802:

(a) Present Scotland, C. J. and Frere, J.

(b) Mad. S. J. 1862, p. 19.

1862. January 5. S. A. No. 15 of 1862.

VIII. " Proprietors of land shall be at free liberty to transfer, without the previous consent of the Government, or of any other authority, to whomever they may think proper, by sale, gift or otherwise, their proprietary right on the whole or in any part of their Zamíndárís; such transfers of land shall be valid, and shall be respected by the Court of Judicature and by the officers of Government; provided they shall not be repugnant to the Muhammadan or to the Hindú laws, or to the regulations of the British Government. But unless such sale, gift or transfer shall have been regularly registered at the office of the collector, and unless the public assessment shall have been previously determined and fixed on such separated portions of land by the collector, such sale, gift or transfer shall be of no legal force or effect, nor shall such transaction exempt a Zamíndár from the payment of any part of the public land tax assessed on the entire Zamíndárí previously to the whole such transfer, but the whole Zamíndárí shall continue to be answerable for the total land tax, in the same manner as if no such transaction had occurred."

XII. " It shall not be competent to proprietors of land to appropriate any part of a landed estate permanently assessed, to religious or charitable, or to any other purposes, by which it may be intended to exempt such lands from bearing their portion of the public tax; nor shall it be competent to a proprietor of land to resume lands, or to fix a new assessment on lands which may be allotted (at the time when such proprietor may become possessed of the estate in which lands are situated) to religious or to charitable purposes under the denominations of Devasthána or Devadáyam, of Brahmádáyam or Agrahàram, of Yaumiá, Jívadána or Madad-ma'ásh, of Pírán, Faḳírán, or any other description of exempted lands described under the general term of Lákhiráj, unless the consent of the Government shall have been previously obtained for that purpose."

Mayne, Srínivásacháriyár with him for the respondent, the plaintiff.

The facts and arguments sufficiently appear from the judgment, which was delivered by

1863. January 5. S. A. No. 15 of 1862.

SCOTLAND, C. J. :—This was a suit for the recovery of the three villages of Puḷḷánéri Bommináykkampuṭṭi and Vírappampuṭṭi, forming a portion of the Tiriyála muṭhṭhá, in the ta'aluḳ of Tiruppattúr, to which the plaintiff claims to be entitled under a permanent lease or paṭṭá executed in 1838 by the first defendant, Veṅkaṭa Piḷḷai since deceased, and his brother Raṅga Piḷḷai, the father of the second, third and fourth defendants, who died some years prior to the commencement of the suit. These persons, with another brother, Vírarágava Piḷḷai, the husband of the fifth and father-in-law of the sixth and seventh defendants, were, it appears, proprietors of the muṭhṭhá, and had before the date of the lease divided between them the enjoyment of the villages of which the muṭhṭhá consisted. The plaintiff entered and was in possession under the lease until 1842, when he was dispossessed; and in 1852 he brought the present suit, which was subsequently transferred in the year 1856 to the Subordinate Court.

The eighth and ninth defendants pleaded amongst other things that their father acquired a portion of the muṭhṭhá including the three villages now in question, by purchase from the proprietors Veṅkaṭa Piḷḷai and Vírarágava Piḷḷai in the year 1842, that the lease on which the plaintiff's claim is based, is of an illegal character, and that it had been expressly disallowed by the Collector.

The Subordinate Judge considered that the plaintiff had proved his right to recover under the permanent lease, and passed judgment in his favour. This decision was confirmed on appeal by the Civil Judge.

The eighth defendant has now preferred a special appeal against this latter judgment, upon the grounds, amongst others, that the lease of 1838 was not in accordance with clauses 2 and 3, section 4 and section 5 of Regulation XXX of 1802, and therefore invalid in point of law; and that at all events all right and title of the plaintiff under the lease ceased upon the death of the parties making it, and consequently the plaintiff could not succeed in his claim to recover possession.

Upon neither of these grounds have the Courts below given any opinion, though the points appear to have been

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raised. The judgment of the Subordinate Judge deals simply as regards the plaintiff's case with the question of the genuineness of the lease in point of fact; and the Civil Judge seems, so far as we can observe from his rather unsatisfactory form of judgment, to have done the same.

Considering first the more substantial ground of objection; the question is whether the lease though in terms expressed to be a permanent one, was invalid and ineffectual in point of law to continue to the plaintiff his rights as lessee as against the legal successors of the proprietors who granted it? In other words, whether upon the death of such proprietors, the lease did not altogether cease to have any valid operation? We are opinion that it did. There is nothing before us as to the original grant of the muṭhṭhá, or shewing how it became vested in the late proprietors. The case is left to be decided entirely upon the provisions contained in the Regulations of 1802—the proprietary right to the muṭhṭhá being regarded as a permanent one under such Regulations. There can be no doubt that the force and effect of law must be given to these Regulations as embodying the provisions intended to govern and preserve the permanent proprietary rights *thereby* vested in zamíndárs and other land-holders, their heirs and successors, as well as to secure to the Government a fixed public land-revenue. Regulation XXV more particularly defines the nature and extent of the proprietary rights conferred; and when sections 8 and 12 are considered with its other provisions and the subsequent Regulations, it is clear that a restriction upon the alienation of proprietary rights, except in the manner therein specially provided, is strictly imposed, and so as to invalidate the legal effect of a disposal or transfer of such proprietary rights, as against the Government and the heirs and successors of the proprietor making the disposal or transfer. This construction of the Regulations is supported by the observations of the Court in the case No. 6 of 1821*(a)*, in giving judgment upon the point for decision in that case, (which is a different point from the present) namely, that notwithstanding the Regulations, the grant of the proprietary right was valid and binding as against the

(*a*) Sel. De.c S. U. 218.

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zamíndár himself. Against that judgment, it appears from a note in the first volume of *Morley's Digest*, p. 624, an appeal was instituted but not proceeded with, and we find that the case was relied upon in the argument before the Privy Council of the appeal case *Raja Row* | *Vencata Niladry Row* v. *Vutchavoy Vencataputty Raz*, and a full note of it is appended to the report of the appeal case in 3 Knapp's P. C. Rep. 27. Another case relied upon for the appellant was *Special Appeal No.* 210 *of* 1861*(a)*, and certainly it seems to have been taken for granted in that case that the grant by the former zamíndár was invalid, unless, as was unsuccessfully contended, it could be considered as waste within the meaning of section 15 of Regulation XXX. In the present case there is no ground whatever for saying that the permanent lease is brought within any of the exceptions or enabling provisions contained in the Regulations; and we think that a lease so affecting the permanent proprietary rights of the heir and successor in the land, must be considered quite as much within the operation of the Regulations as an absolute transfer by gift or sale, and therefore that any title or interest that the plaintiff had under it, has altogether ceased.

With respect to the point taken by Mr. Mayne, that the eighth defendant (the appellant) could not be heard to object to the validity of the lease, as he himself claimed under a subsequent sale made by the late proprietors, we are of opinion that upon the ground upheld by our present decision that the plaintiff had failed to make out an existing legal right entitling him to recover possession of the villages, the eighth defendant was entitled to rely upon the objection quite independently of the title in himself.

With regard to the other objections raised to the validity of the lease on the ground of non-compliance in several particulars with the requirements of the Regulations, it becomes unnecessary for us after the decision just expressed to give any opinion.

Upon the whole, then, our judgment is that the plaintiff's right to maintain the suit altogether fails, and that the decree of the Civil Judge must be reversed with costs to be paid by the plaintiff.

Appeal allowed.

(a) Mad. S. D. 1862, p. 19.

Appellate Jurisdiction (a)

Special Appeal No. 659 *of* 1861.

PUDIYAKO'VILAGALLA..................*Appellant.*
ALLUNANNALATTA KADINNI.........*Respondent.*

In 1841 A established her proprietary right to lands as against B, and an otti mortgagee then in possession. In 1844 B obtained a decree against the mortgagee in a suit to which A was not a party, and assigned his rights under the mortgage to C, who continued to hold as B's assignee down to 1860:—*Held*, that unless A was aware, or might by ordinary diligence have been aware, of the suit of 1844, his right to redeem the lands was not barred by the lapse of twelve years from the decree in that suit.

The order of the Madras Ṣadr 'Adálat of 12th September 1851 refers only to summary applications for the execution of decrees.

1863. *January* 15. *S. A. No.* 659 *of* 1861.

THIS was a special appeal from the decision of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 44 of 1860, by which he dismissed the suit on the ground that the plaintiff was barred by the order of the late Ṣadr 'Adálat, dated the 12th September 1851. That order provides that no decree shall be executed after the lapse of twelve years unless the party applying for execution shews by clear and positive proof that the application is on one or other of the grounds specified in clause 4, section 18 of Regulation II of 1802, excepted from the general rule of limitation prescribed in that section.

Karuṇágara Manavan for the appellant, the plaintiff.
The facts appear from the following

JUDGMENT:—The appellant in this case was the plaintiff in the original suit, and sued to recover certain lands said to be held by the second defendant, on an otti mortgage for rupees 157-2-3.

It was alleged in the plaint that the lands were formerly the janmam property of the first defendant's family, by whom they were sold to the plaintiff in 1840. Subsequently the plaintiff, by a suit in 1841, established her proprietary right to the land as against the first defendant's family and a mortgagee named Muḥammad Ismáyil, who was then in possession. In 1844, however, the first defendant himself sued this otti mortgagee, and obtained a decree against him

(a) Present Strange and Frere, J J.

1863. January 15. S. A. No. 659 of 1861.

in a suit to which the plaintiff was not a party, since which time the second defendant who had obtained a transfer of the pretended rights of the first defendant, has held possession. The plaintiff therefore sued to eject the second defendant and offered to pay off the amount of the mortgage.

The District Munsif observed that the plaintiff's assertions were supported by the tenor of the decrees formerly passed in the suits of 1841 and 1844, to which allusion has been already made, and accordingly passed judgment in her favor with costs, declaring her entitled to possession of the lands as janmam proprietor on paying to the second defendant the amount of the mortgage to which his rights were limited. This decision, however was reversed by the Civil Judge, who dismissed the claim of the plaintiff, on the ground that a period of more than twelve years had elapsed since the date of the decree in the suit of 1841, which pronounced the plaintiff to be entitled to possession as janmam proprietor, and that the claim of the plaintiff was therefore in the opinion of the Civil Judge, unsustainable with reference to the terms of the circular order of the late Ṣadr Court under date 12th September 1851.

The orders of the late Ṣadr Court on which the Civil Judge has based his decision, have reference only to summary applications for the execution of decrees, and have no connection with a case of such a nature as that now before us.

In the present instance, it is shewn that the decree of 1841 established the plaintiff's proprietary right as against the first defendant and the otti mortgagee in possession, Muḥammad Ismáyíl. This relation of things would not terminate by mere lapse of time, and unless the plaintiff was aware, or might by ordinary diligence have been aware, of the suit of 1844, by which the first defendant procured a judicial confirmation of his assumed proprietary right as against the mortgagee only, the claim of the plaintiff is not barred, though twelve years may have elapsed from the date of the decree in the latter case to that of the institution of the present suit. We fail to perceive that the plaintiff had any such notice of the suit of 1844, or that any thing occurred which was calculated to put her on inquiry into the nature

1863. January 15. S. A. No. 650 of 1861.

of the title claimed by the second defendant, who displaced the former mortgagee. We think it necessary therefore to reverse the decree of the civil judge, and to confirm that of the court of first instance. The second defendant will be charged with the costs incurred by the plaintiff in the appeal and special appeal suits.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 5 *of* 1862.

PITCHAKUTTI CHETTI..................*Appellant.*
PONNAMMA NA'TCHIYA'R...............*Respondent.*

A Zamíndár granted part of his zamíndárí absolutely and died. His grantee was then dispossessed by a purchaser from his successor:—*Held*, that as the conditions specified in Reg. XXV of 1802, sec. 8 had not been observed by the former Zamíndár, the grant was voidable on the determination of his interest, and that consequently the dispossession was legal.

1863. January 17. S. A. No. 5 of 1862.

THIS was a special appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Appeal Suit No. 122 of 1861 affirming the decree of J. H. Goldingham, Acting Judge of the Subordinate Court of Madura, in Original Suit No. 21 of 1860.

Branson for the appellant, the first defendant.

Mayne for the respondent, the plaintiff.

The facts appear from the following

JUDGMENT:—This was a claim for four villages, forming a portion of the estate of Padamáttúr, founded on a grant in 1839 from the then Zamíndár to his wife the present plaintiff.

The plaintiff alleged that she was in possession under the grant down to the year 1855, when she was dispossessed by the first defendant, who claimed under a sale executed in his favour by the present Zamíndár, the second defendant.

(a) Present Strange and Frere, J J.

The Subordinate Judge considered the sale to the first defendant by the present Zamíndár to be fully proved, but pronounced it to be invalid on the ground of the previous grant to the plaintiff by the former Zamíndár, and passed judgment for the plaintiff accordingly. This decree was confirmed in appeal by the Civil Judge.

1863. *January* 17. *S. A. No.* 5 *of* 1862.

The plaintiff in this case claims under a grant from her husband the late Zamíndár now deceased. It is not asserted that the conditions specified in section 8, Regulation XXV of 1802*(a)* have been fulfilled in this particular case, and it is consequently clear from the terms of that section, especially as explained in the decree of the late Madras Ṣadr Court in Appeal No. 6 of 1821, at page 284 of the Select Decrees, that such an alienation is voidable on the determination of the interest of the party by whom it was made. The claim of the plaintiff therefore is not legally sustainable as against that of the first defendant, whose possession is supported by a *bonâ fide* deed of sale executed by the present Zamíndár, who was no party to the grant in favour of the plaintiff.

We consider it necessary therefore to set aside the decrees of the lower Courts, and to dismiss the claim of the plaintiff, with all costs of suit.

Appeal allowed.

(*a*) See this section set out *supra*, p. 142.

Appellate Jurisdiction (a)

Special Appeal No. 91 *of* 1862.

Ḳa'darba'cha Sa'hib...............*Appellant.*

Raṅgasva'mi Na'yak...............*Respondent.*

By Hindú law the assignee of a debt can sue the debtor in his own name.

Where a bond was seized under legal process of attachment after it had become due but before the lapse of twelve years from its date and remained under attachment for several years:—*Held* that there was "good and sufficient cause" for the lapse of time within the meaning of Regulation II of 1802, sec. 18, cl. 4, and that a suit on the bond was therefore not barred.

1863. *January* 19. *S. A. No.* 91 *of* 1862.

THIS was a special appeal against the decree of Kristnasvámí Ayyá, the Principal Ṣadr Amín of Tinnevelly, in Appeal Suit No. 439 of 1861. The original suit No. 634 of 1861 was brought before the District Munsif of Nellayambalam against the present appellant and others to recover rupees 800 secured by a bond, dated the 25th September 1833, which fell due on the 25th of September 1834. Prior to 1845 the bond had been attached, and it remained under attachment till the 9th of February 1859, when the plaintiff bought it at a public auction held by the Court of the Principal Ṣadr Amín. The District Munsif decreed for the plaintiff, and, on appeal, the Principal Ṣadr Amín confirmed his decree.

Miller for the appellant, the third defendant. First, the bond is not a negotiable instrument, and the plaintiff as assignee of a chose in action is not the proper party to sue. Secondly, the statute of limitations is a bar. Thirdly, no order for sale of the bond has been put in.

Scotland, C. J.:—As to the first point, the rule of the Hindú law is the same as that which has always prevailed in English Courts of Equity and in all countries whose jurisprudence is founded on the Civil Law. By the common law of England, no doubt, the assignee of a debt (except in case of the king) must always have sued in the assignór's name. But this is a mere shadow and relic of the old rule that a

(a) Present Scotland, C. J. and Strange, J.

1863. January 19. S. A. No. 91 of 1862.

chose in action could not be assigned, and can have no application here. The assignee of a chose in action may clearly sue in his own name, whether or not the debtor assents to the transfer.

As to the second point—Regulation II of 1802, section XVIII, clause 4 applies. That prohibits the Courts of 'Adálat from trying any suit whatever, where the cause of action shall have arisen twelve years before, unless in the cases therein specified, one of which is that the complainant "shall prove that, either from minority, *or other good and sufficient cause*, he was precluded from obtaining redress." Then was there any such good and sufficient cause in the present case? I think there was. It must be understood that twelve years had not expired before the attachment, and that such attachment was of the ordinary description. The bond was attached by the Court and placed under its power and controul. Whilst it so remained, no one could deal with it except by the direction and order of the Court. I think the attachment was good and sufficient cause precluding the obtaining of redress within the meaning of the Regulation, and that the plaintiff, who sued in 1861, cannot be said to have been barred.

With regard to the third point—that no order for sale of the bond was put in—that objection was not taken in the court below when it would have been abundantly proved. Moreover, the order for sale is recited in a document which the appellant allowed to be taken as evidence. The Judge has acted upon this evidence, and the appellant cannot now avail himself of the objection.

The appeal must therefore be dismissed with costs.

STRANGE, J. concurred.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 4 *of* 1862.

HUTUMA'N SA'HIB *against* HUSAIN SA'HIB.

An instrument to the following effect "On the 14th December 1861, we A. and Co. bind ourselves to pay with interest to you B. and C. rupees 566-10-0, being the balance of dealings held with your firm, and the amount received this day from you in cash on account of stamp":—*Held* to be neither a bond nor a hundí, but to be in the nature of a promissory note, and to come within the description in clause 4, schedule A of Act XXXVI of 1860.

1863. *January* 19. *R. C. No.* 4 *of* 1862.

CASE referred by R. J. Melville, the Acting Judge of the Court of Small Causes at Chittúr.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for our opinion in this case is, whether or not, under Act XXXVI of 1860, the instrument upon which the plaintiff sued in the Court of Small Causes at Chittúr was sufficiently stamped when produced in evidence? It bore a one-anna stamp, and the Acting Judge, being of opinion that it was a bond, refused to receive it except upon payment into Court of a sum equal to the stamp of five rupees and the penalty required by clause 2, section 13 of the Act. This sum was accordingly paid in, subject to the opinion of this Court upon the point, and the plaintiffs had judgment given in their favour.

The instrument is as follows:—

"On the 14th December 1861, we, Pungalam Husain Sáhib and Co., of Peṭṭamúr and partners of the sugar manufactory at the village of Palachérvu in the ta'aluk of Chillagaṭṭu in Bangalore Division, bind ourselves to pay, with interest, to Hutumán Sáhib and Ismál Sáhib of Periyameṭṭu, in Madras, the sum of rupees (566-10-0) five hundred and sixty-six and annas ten, being the balance of dealings held with your firm and the amount received this day from you in cash on account of stamp."

The point to be considered is, whether this instrument comes properly under the 4th clause in schedule A of the Act (Act XXXVI of 1860), for, if so, then it becomes an

(a) Present Scotland, C. J. and Phillips, J.

instrument for the payment of money "otherwise charged for," and consequently not a bond or other obligation within clause 8 of the same schedule. We are of opinion that although not a hundí, it is in the nature of a promissory note, and comes within the description in clause 4: "other orders and obligations for the payment of money not being bonds or instruments or writings bearing the attestation of one or more witnesses."

1863. *January* 19. *R. C. No.* 4 *of* 1862.

Appellate Jurisdiction (a)

Regular Appeal No. 20 *of* 1862.

PITCHAKUTTI CHETTI...............*Appellant.*
KAMALA NA'YAKKAN...............*Respondent.*

An instrument which is in terms a temporary lease is as binding on the lessor *quâ* lease, where the tenancy is to commence at a future day, or on the determination of an existing lease under which another lessee is in possession, as where it commences immediately.

The law of England as to the offences of maintenance and champerty does not apply to natives of India. In dealing with objections to their contracts, on the ground of maintenance or champerty, the Court must look to the general principles regarding public policy and the administration of justice upon which that law at present rests.

To constitute "maintenance" improper litigation must have been stirred up with a bad motive or purpose, contrary to public policy and justice.

"Champerty" is a species of "maintenance," and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the litigation.

Specific performance decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease, the plaintiff was to lend the defendant money to enable him *(inter alia)* to commence legal proceedings against the then tenant of the subject-matter of the intended lease.

THIS was a regular appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Original Suit No. 1 of 1858.

1863. *January* 19. *R. A. No.* 20 *of* 1862.

The defendant was proprietor of a zamíndárí named Ammayanáyakkanúr, which was rented to one Mr. Fondeclair. The defendant having disagreed with his tenant, determined to institute legal proceedings against him, and to

(a) Present Scotland, C. J. and Strange, J.

1863. January 19. R. A. No. 20 of 1862.

enable him to do this, and to meet the demands of one Rámakrishṇa Cheṭṭi, as also obviously with the view of making fresh provision for a lease of the zamíndárí, the defendant came to an arrangement with the plaintiff by which the plaintiff was to make an advance of money to the defendant by way of loan, and the defendant was to execute a lease of the zamíndárí to the plaintiff. Under this arrangement the defendant, on the 17th September 1851, executed to the plaintiff two bonds, one for 2,000 rupees and the other for 100 rupees, and also a lease of the zamíndárí (marked A) for the term of ten years, to take effect from faṣlí 1267 or the year 1857, or (if the defendant was successful in his said legal proceedings) from faṣlí 1266 or the year 1856. And on the same day, the defendant executed and delivered to the plaintiff a tákíd or order addressed to the náṭṭánmaikáran, karaṇams, and the other villagers, reciting that he had made the lease and requiring them to pay to the plaintiff during the term and to place themselves under his orders. The period for the plaintiff entering upon his lease of the zamíndárí having arrived, and the defendant having obstructed him when about to take possession, this suit was been brought to enforce specific performance of the lease.

The defendant met the suit by the defence that the lease had been obtained from him under improper influence and fraudulently, and that it had been made void by reason of the plaintiff's non-performance of the stipulations contained in an instrument executed by the plaintiff on the 25th November 1851, (marked No. I on the record), wherein the plaintiff had acknowledged that of the sum of rupees 3,000 abovementioned, which the defendant was to receive from him on loan, no more than rupees 1,052 had been advanced; and had agreed that on failure to pay the residue by the 30th November 1851, he would have nothing to do with the lease and would return to the defendant the deed of lease and the bonds and receive back from the defendant the loan of 1,052 rupees with interest. The third paragraph of the answer was as follows:—" The sum of rupees 3,000 which is said to have been advanced to the defendant by the plaintiff for the agreement in question was not paid. The plaintiff has entirely omitted to mention in his plaint the stipulations of the documents passed respecting the same, and the documents passed in pursuance thereof, in regard to

certain other transactions, as also the stipulations of these documents, by which the plaintiff is bound to do certain acts."

The case came on for trial before the Civil Judge of Madura, and was, in the first instance, dismissed by him, on the ground that the lease on which it was founded had not been completed: that it was without consideration; and that, in terms, it provided expressly, by way of penalty, that a breach of the engagement was to be remedied by compensation for loss incurred.

Upon appeal against this decision the late Sadr Court, on the 8th February 1862, overruled the objections taken by the Civil Judge and remanded the case to him to be disposed of upon its merits generally. The case was accordingly heard on the 16th April 1862, when the Civil Judge passed the judgment which was the subject of the present appeal.

He held that the instrument of lease was merely an incomplete promise or agreement (citing *Special Appeal* No. 42 of 1853), and that the plaintiff's only remedy was a suit for damages. He also held that the transaction was 'maintenance' and savoured likewise of 'champerty' and cited Russell on Crimes, chapter xx, *Special Appeal* No. 129 of 1856, the maxims 'quod ab initio non valet in tractu temporis non convalescit,' and 'ex nudo pacto non oritur actio,' Wilmot, C. J. in 1 Norton's *Topics of Jurisprudence* 264, 265, and Story's *Equity Jurisprudence* §§ 769, 787, 793. The 20th and 21st paragraphs of his judgment were as follows:

"XX. Setting aside then all objections to A, the present claim depends entirely on whether the exhibit No. I is genuine or not. It has of course been repudiated by plaintiff. Five witnesses have been examined in support of it, namely the writer of it, and two attesting witnesses, and two others, whoever they were, present when it was executed. It is deposed it was executed in the same house (that of one Chelamaiyar) that A was, and is attested by one of the *same* parties who attested A. Chelamaiyar was another party who signed it, as a witness; this individual is deposed to have died ten years ago; but on the court calling for the records in some suits, in which he was concerned, and comparing

1863. January 19. R. A. No. 20 of 1862.

his signature in the deed No. I, with those affixed, and his hand in certain papers of record, *about the same time*, it finds them to correspond, as does also the signature of the plaintiff in the deed, with others affixed to papers in the records.

"XXI. It may appear suspicious that, with such a document, the defendant did not at once deny the validity of A; but there is no accounting for a native's acts, and he may have been afraid to produce it, at the onset, for fear that the witnesses to it should become known and be tampered with: *indirect* allusion however was made in the answer to plaintiff's having concealed certain facts regarding the engagement and himself broken the contract. The court sees no grounds for questioning the evidence of the witnesses, it was given straightforwardly, and is unshaken by plaintiff's cross-examination."

Branson for the appellant, the plaintiff.

Mayne for the respondent, the defendant.

SCOTLAND, C. J. [after stating the facts above set forth, referred to the Civil Judge's judgment, and proceeded thus:—]

In preparing that judgment both care and some research have evidently been exercised, and although we cannot follow throughout the reasoning of the Civil Judge, or concur in the appositeness of all the authorities to which he refers, the judgment, we think, very distinctly and clearly states the grounds of the decision come to. Of these grounds two involve objections raised, not by the defendant, but by the judge himself, and held to be valid; and with these we will first deal. One objection is that as the defendant was not in possession of the zamíndárí, and the term of the tenancy was to commence at a future time, the instrument of lease could not be considered as anything more than an incomplete promise or agreement for the breach of which the plaintiff's only remedy was a suit for damages. The other objection is that the transaction between the parties amounted to the offence of "maintenance" and savoured of the offence of "champerty," and that the lease therefore was void.

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Neither of these objections is, we think, tenable; and indeed the learned advocate of the respondent, who made no attempt to support them by argument, appeared to us to concede this at the hearing. With reference to the first objection it is clear law that an instrument which is in terms a temporary lease is just as effectual and binding upon the lessor *as a lease*, where the term of the tenancy is expressed to commence at a future day, as where it commences immediately; and it can make no legal difference in this respect that the term is made to commence from or upon the determination of a prior lease for years under which, at the time, another lessee is in possession. To make the instrument a lease, it must, of course, contain words of actual demise and not merely be an agreement for a lease; and in the present case, there can be no doubt that the instrument (A) was intended to be, and is, in terms, an actual lease of the zamíndárí. It is not necessary after the former judgment of the late Ṣadr Court to say more on this point: but we must not be understood as adopting the opinion of the Civil Judge, supposing him to have been right in treating the instrument as an agreement simply, that then the plaintiff's only remedy would have been a suit for damages.

Then, as regards the other objection:—" maintenance" and " champerty" are made offences by the common and statute law of England, which, in this respect, has no application to the natives of this country; and in considering and deciding upon objections to the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice, upon which the law at present rests. To that extent we think the law can properly be adopted and applied in perfect consistency with the Hindú law relating to contracts. See 1 Strange's *Hindú Law* 275. In this case the " maintenance" is alleged to be the loan of money by the plaintiff to enable the defendant to sue and eject his tenant Fondeclair; but that of itself is not sufficient. There should appear to be the instigation of improper litigation with a bad purpose or motive, contrary to public policy and justice. In *Findon* v. *Parker*(a), Lord Abinger says; " The law of maintenance, as I understand upon the modern con-

(a) 11 M. & W. 682.

1868. January 19. R. A. No. 20 of 1862.

struction, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defences which they have no right to make;" and in the late appeal case of *Fischer* v. *Kamala Naiken*(a) relating to this very zamíndárí, Sir John Coleridge, in delivering the judgment of the Privy Council, observes, as to maintenance, that "it must be against good policy and justice, something tending to promote unnecessary litigation, something that is immoral, and to the constitution of which a bad motive in the same sense is necessary."—See also *Flight* v. *Leman*(b). Here, all that appears in evidence upon this matter is what is stated in the case and in the two bonds executed by the defendant, and we think there is nothing in these documents which can be said to bring this case within the law of maintenance as just stated. On the point of champerty, which is a species of maintenance and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the suit, we may add, although not necessary, that, when the nature of the lease and the mutual stipulations and undertakings contained in it are considered, there is no ground, we think, for the opinion that a part of the lease savoured of champerty.

We next proceed to the consideration of the other questions affecting the real merits of the case. The Civil Judge has rightly disallowed the defendant's plea, that the lease in issue was obtained from him under improper influences and fraudulently, as being unsupported by the evidence, and having so decided, it would have been better, we think, if he had abstained from making the observation referring to the plaintiff, that accompanies his decision. Observations not called for nor warranted by the evidence should, as much as possible be avoided, and the more so where, as in the present instance, they tend to convey a stigma on the character of one of the litigants before the court, and who, so far as the record discloses, may have been dealing fairly and openly with the defendant.

The remaining question is the genuineness and validity of the defendant's exhibit No. I, before described. If estab-

(a) 8 Moo. I. A. Ca. 187. (b) 4 Q. B. 883.

lished, this instrument makes void the lease. If it fail of proof, the lease holds good and must be enforced. And we are of opinion that the evidence fails to establish that it is a genuine instrument.

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There is certainly oral evidence to the execution of the instrument by the plaintiff, but the credibility of the witnesses, and the weight and effect to be given to evidence of this nature, must be tested by all the circumstances and probabilities of the case, and these, in our apprehension, are the reverse of favouring the truthfulness of the witnesses.

The lease in issue, A, is on a stamp and the document was publicly registered. The instrument to cancel it, No. I, is an unstamped paper; and it is highly improbable that the precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place, as far as possible, beyond question, an instrument obtained to make void the lease, if such instrument were genuine.

The document (No. 1) purports to bear date in 1851, shortly after the lease, and stipulates for the return of the lease and the bonds, and yet the lease and the bonds have remained undisturbed in the plaintiff's hands for the six years and upwards that intervened to the institution of this suit. It is not probable that the plaintiff should thus have been left in quiet possession of a document of so much importance as the lease, had it been really cancelled. There is, no doubt, some evidence as to the defendant having applied to the plaintiff to get back the lease; but it is given only by witnesses brought to speak also to the execution of the document No. I, and is not satisfactory, and considered with the other circumstances of the case, cannot, we think, be relied upon.

Then with reference to what is stated in No. I as to the sums paid by the plaintiff, it is hardly possible to believe that it was executed by the plaintiff when the other undoubtedly genuine documents given to the plaintiff, and allowed for years to remain in his possession, are considered. The loan of rupees 3,000 by the plaintiff, besides being mentioned in the lease as having been actually made, is secured by the two bonds taken from the defendant on the same date that the lease was executed, and which are marked C and D. Now

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it is consistent and reasonable that they should remain with the plaintiff as a security for the loan in expectation of his enjoyment of the lease: but it is quite otherwise if the case as respects No. I were as represented by the defendant; and we can see from the evidence no satisfactory reason for the plaintiff not having, as alleged, advanced the full amount of the loan, or for believing, when the terms of the lease are considered, that he would have been otherwise than ready and probably anxious to do so.

There is the further strong observation to be made as regards the defence set up by the appellant in the first instance, that if really armed with a genuine instrument to defeat the suit, such as the exhibit No. I, the defendant would assuredly not have met the plaint in the manner he has done in his written answer. It is only natural and reasonable to expect that the appellant, though a native, would have boldly asserted the existence of the instrument, and relied upon its terms; but instead of this we find no reference made to the document unless, as has been said, the vague general words in paragraph 3 of the answer were meant to apply to it. *If so*, the only rational conclusion that we can come to is, that this, probably, was done designedly in order to avoid the mention of the instrument (if it then existed), which it was known could not safely be at once put forward as genuine, and at the same time to admit covertly of its being afterwards relied upon as a defence. We cannot reasonably adopt the suggestions made by the Civil Judge, and get rid of the great improbability of this part of the case and suppose a perfect honesty of purpose, on the ground that "there is no accounting for a native's acts." There is a further suspicious circumstance to which we may here allude. The general words used are inconsistent with the defence subsequently and actually rested on. In the answer, documents, stipulations, other transactions, and acts to which the plaintiff had bound himself are adverted to. But the actual defence depends upon but one alleged document, namely, the exhibit No. I with the simple stipulation on the part of the plaintiff that unless the plaintiff made good the balance of the loan expected of him within five days, he was to forfeit the lease and return it and the bonds.

In addition to the several improbabilities that we have pointed out, there are other circumstances that materially

affect the credibility of the witnesses who speak directly to the execution of the instrument. They are, one and all, connected intimately with the defendant, as his dependants or otherwise; and their statements are no more than might be made if the instrument were not genuine. In a real transaction of this kind, it is fair to presume that both parties would have been represented in their witnesses, or that some disinterested persons neutral to them both would have been witnesses. The evidence of one witness, namely the third, is specially shown to be untrustworthy. He professes to be the writer of the exhibit, and yet makes the strange statement that for the two years preceding his examination he was unable to write. What he meant by this does not appear to have been elicited, and he seems to have been able to put his signature in full to his deposition. Now, on comparing this signature with the hand-writing of the exhibit in question, they are found to be very dissimilar, and this may account for the strange statement made by the witness.

We find, further, on examining the document (No. I) that the alleged writer's name has been tampered with, two letters having been written over and altered, very apparently, into two other letters. Thus the name Ammávaiyan*(a)* has been altered into Appávaiyan*(b)*, the latter being the deponent's name; and this, we are led to suspect, was done for the purpose of meeting this witness's evidence.

Upon consideration, then, of all the circumstances affecting the credibility of the witnesses and the whole of the evidence together with the probabilities and improbabilities of the case, we are clearly of opinion that the document No. I, has not been proved to be a genuine and binding instrument.

Our judgment is that the Civil Judge's decree must be reversed, and that the plaintiff is entitled to specific performance of the lease and to the possession and enjoyment of the zamíndárí of Ammayanáyakkanúr under the terms of such lease.

(a) அம்மாவையன். (b) அப்பாவையன்

W

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The costs throughout are to be discharged by the defendant.

Decree reversed.

NOTE.—Recent English cases as to maintenance and champerty are *Anderson* v. *Ratcliffe*, E. B. & E. 806; 28 L. J. Q. B. 32 S. C.: *Sprye* v. *Porter* 7 E. & B. 58: 28 L. J. Q. B. 64 S. C.: *Simpson* v. *Lamb* 7 E. & B. 84: *Knight* v. *Bowyer* 27 L. J. Ch. 521 : *Bainbridge* v. *Moss*, 3 Jur. N. S. 58: *Earle* v. *Hopwood* 9 C. B. N. S. 566: 7 Jur. N. S. 775 S. C.: *Hare* v. *London and N. W. Ry. Co.* Johns. 722: *Tyson* v. *Jackson*, 30 Beav. 384, 387.

Original Jurisdiction (a)

Original Suit No. 1 *of* 1862.

MANSUK DA'S *against* RAÑGA'YYA CHEṬṬI.

In an action by a vendor against a vendee for non-performance of a contract to deliver goods, which specifies no time for delivery, the measure of damages is the difference between the contract-price and that which goods of a like description bore on the lapse of a reasonable time for delivery.

Where a vendor contracts to deliver goods within a reasonable time, and payment is to be made on delivery, if before the lapse of that time he merely expresses an intention not to perform the contract, the purchaser cannot at once bring his action, unless he exercise his option to treat the contract as rescinded.

1863. January 23. O. S. No. 1 of 1862.

THIS was an action by a vendee against a vendor for not delivering cotton pursuant to a contract entered into on the 16th of July 1862. The contract was oral and payment was to be made on delivery, for which, however, no time was specified.

Norton and *Mayne* for the plaintiff.

Branson and *Arthur Branson* for the defendant.

The plaintiff having proved his right to recover, the question was what was the rule for measuring the damages?

SCOTLAND, C. J.:—In cases like the present the measure of damages is the difference between the contract-price and that for which goods of the same description and quality as the goods contracted for could have been obtained in the market; and here, I think, we must look at the market-price on the lapse of a reasonable time for delivery. The question then is, when did such reasonable time expire? Looking to

(a) Present Scotland, C. J. and Bittleston, J.

the evidence that the demand for cotton was very great at and for some time after the execution of the contract and that there was therefore difficulty in obtaining the means of fulfilling this contract on the part of the vendor,—all of which was well known to the plaintiff when the contract was made,—in this case we do not think that nine days were an unreasonable time to allow for performance.

It appears, no doubt, in evidence that on the 16th of July the defendant had told the plaintiff that he did not intend to execute the contract. But if a vendor contract to deliver goods within a reasonable time—payment to be made on delivery—and before the lapse of that time,—before the contract becomes absolute,—he says to the purchaser 'I will not deliver the goods,' the latter is not thereby immediately bound to treat the contract as broken and bring his action. The contract is not necessarily broken by the notice. That notice is, as respects the right to enforce the contract, a perfect nullity, a mere expression of intention to break the contract, capable of being retracted until the expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action, unless, of course, the purchaser thereupon exercise his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained. The law on this subject will be found in *Leigh* v. *Paterson(a)* and *Phillpotts* v *Evans(b)*, the authority of which cases was upheld in *Hochster* v. *DeLatour(c)*.

The damages will therefore be calculated in reference to the price of cotton on the 25th of July, as that was the earliest day on which it can fairly be said that a reasonable time had elapsed.

BITTLESTON, J. concurred.

Judgment for the plaintiff for rupees 3,700 *and costs.*

(a) 8 Taunt. 540. (b) 5 M. & W. 475.
(c) 2 E. & B. 678; 22 L. J. Q. B. 455 S. C. and see *Ripley* v. *McClure* 4 Ex. 345, 359.

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NOTE.—As to the doctrine that where a party to a contract utterly repudiates it, or puts it out of his power to perform it, the injured party may at his option sue at once or wait till the time for performance has elapsed, see, besides *Hochster* v. *DeLatour* above cited (where Lord Campbell, C. J. overruled Parke B.'s doctrine in *Philpotts* v. *Evans*, that the injured party must wait till the time fixed for performance), *Reid* v. *Hoskins* 25 L. J. Q. B. 55, S. C. in error 26 L. J. Q. B. 5; *Avery* v. *Bowden*, 5 El. & B. 714, S. C. 25 L. J. Q. B. 49: in error 6 El. & B. 953, S. C. 26 L. J. Q. B. 3: *Barwick* v. *Buba* 26 L. J. C. P. 280: *Pole* v. *Cetcovich*, 30 L. J. C. P. 102: *Danube and Black Sea Railway* v. *Xenos*, 31 L. J. C. P. 84; and Mayne on Damages, pp. 79, 80.

Appellate Jurisdiction (a)

Special Appeal No. 53 *of* 1862.

GURUMU'RTTI NA'YUDU............*Appellant.*
PA'PPA' NA'YUDU....................*Respondent.*

When a Court has granted a review, the High Court on appeal will not interfere, though the grounds for granting the review may have been improper or insufficient.

On an enquiry whether a signature is genuine, the signature cannot be compared with a document not before the Court, or with one of which the authenticity is disputed.

1863.
January 26.
S. A. No. 53
of 1862.

THIS was a special appeal against the decree of J. Ratliff, the Civil Judge of Bellary, in Appeal Suit No. 245 of 1861, in which he reviewed and reversed a decision of his predecessor P. Irvine, reversing the District Munsif's judgment in favour of the plaintiff in Original Suit No. 574 of 1861.

The plaintiff sued on a bond alleged to have been executed by the first defendant. This defendant, Páppá Náyuḍu, pleaded that the bond was a forgery. The District Munsif decreed for the plaintiff: the defendant appealed, and Mr. Irvine reversed the decree.

Mr. Ratliff, Mr. Irvine's successor, granted a review of judgment, caused the defendant to make a signature before the Court, and then compared the signature to the bond with this and with four others of the same party, procured from the superintendent of police and the office of the district engineer. From this evidence Mr. Ratliff came to the conclusion that the bond was not a forgery, and decided against the defendant.

(a) Present Scotland, C. J. and Frere, J.

Mr. Ratliff's judgment contained the following passages:

"3. That the original of exhibit No. 1, filed by defendant is as presently pleaded, a *forgery*, appears clear from the documents filed by plaintiff in support of the allegation, whilst it would further appear from a communication made to this Court by the district engineer, under date 3rd July 1862, and in reply to a question on the subject, that defendant was dismissed from his situation in the department of public works for similar nefarious proceedings, to wit for tampering with certain vouchers in the office, and in one of his documents forged Mr. Ross's signature.

"4. The Government vakil has on oath given evidence on review-hearing tending very strongly to support the bonâ fide character of the bond sued on.

"5. Convinced in his own mind that the signature at foot of said bond was made by defendant himself, and it being evident, morever, that said defendant has attempted to support his repudiation of the document by having recourse to forgery, as well as inferable that he is anything but unaccustomed to resort to said nefarious tactics, the civil judge unhesitatingly rejects his appeal, and confirms the original decree passed against him, assessing him, with all subsequent costs."

Mayne, for the appellant, the plaintiff: First, Mr. Ratliff had no jurisdiction to review Mr. Irvine's decision on a mere question of facts. Counsel referred to ss. 376, 378 of Act VIII of 1859.

Secondly, none of the documents with which the Civil Judge compared the signature to the bond were filed; and as it does not appear that they were either proved or admitted, he could not compare the bond-signature with them.

Branson, for the respondent: Whether the Court acted rightly or wrongly in granting the review is not matter of appeal. It lay in the discretion of the Court, and its order was final. Sec. 378 of Act VIII of 1859, applies.

SCOTLAND, C. J.:—The first ground of objection on the part of the appellant is that the Civil Judge had no authority to review the decision of his predecessor on a mere

1863. January 26. S. A. No. 53 of 1862.

question of facts; and we are called on to decide whether or not this Court can upon appeal entertain the question of whether the Court below properly exercised its jurisdiction to review. Now sec. 376 of the Civil Procedure Code (Act VIII of 1859) enacts that any person considering himself aggrieved by a decree of any of the Courts therein mentioned, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree. Therefore in order to entitle him to apply for a review, the party must shew the Court either that some matter or evidence has been discovered since the passing of the former decree, or that there is some matter or evidence which he could not then produce, or that there is some other good and sufficient reason. Section 377 then provides within what time and on what paper the application should be made; and then section 378 mentions the circumstances under which the Court is to make an order, whether for rejecting the application or granting the review. This is the important section here. It runs as follows:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, *and its order in either case*, whether for rejecting the application, or granting review, *shall be final*," and concludes with a proviso as to giving notice to the opposite party. Passing over sec. 379 as having no application to the present case, we come to sec. 380, which enacts that "when an application for a review of judgment is granted, a note shall be made in the register of suits or appeals (as the case may be), and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case."

When once, then, the Court has thought it right to grant the review, the case is placed precisely in the situation of a suit to be reheard on the grounds put forward as

the grounds for applying for a review, and the court's order granting the review becomes final under the provision in section 378, and it cannot afterwards be objected upon appeal that the reasons for granting the review, or in other words the rehearing, were improper or insufficient. According to the old Regulation XV of 1816 the Court below could not grant a review. Parties requiring a review had to go to the Ṣadr, and questions like the present could not have arisen. We must take for granted that the legislature had this regulation before their mind when they enacted section 378, and that in transferring the power to grant a review to the court making the decree, it was intended that the exercise of discretion as to the order granting a review should be final, and not subject to appeal.

As to the second ground of objection, there is no doubt that in every case of proof of handwriting by comparison you must first shew the genuineness of the writing with which the comparison is made. Formerly you could not as a rule prove a party's handwriting to a document by comparing it with others in his handwriting unless these were evidence in the cause and admitted or proved to be in his handwriting. Then Act V of 1855*(a)* was passed, and section 48 of that Act provides that " on an enquiry whether a signature, writing or seal is genuine, *any undisputed signature, writing or seal* of the party, whose signature, writing or seal is under dispute, may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause." Now in the present case, if it had appeared that the Civil Judge had compared the signature to the bond with a document not before the Court, or with one whose authenticity was disputed, this would have been an illegal act. But sec. 48 provides that comparison may be made with undisputed signatures on instruments which are not evidence in the cause, and this is all that appears to have been done here. There is nothing to lead to the inference that these instruments were disputed, and we must therefore take it that they were undisputed; if so, Mr. Mayne's objection falls to the ground

(*a*) Compare the Common Law Procedure Act 1854, 17 & 18 Vict. c. 125, ss. 27, 103.

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so far as it relates to the documents not appearing to have been admitted or proved. It further appears that the documents were duly filed. We accordingly must dismiss the appeal, not however without remarking that the Civil Judge seems to have acted most irregularly in receiving and referring to a communication from the district engineer, in answer to a question which appears to have been sent him on the subject of the defendant's character. We cannot suppose that this communication was allowed improperly to influence the Civil Judge's mind, and therefore do no more than refer to it.

FRERE, J. concurred.

Appeal dismissed.

Appellate Jurisdiction (a)

Original Suit No. 11 *of* 1862.

RA'MJI MADAUJI *against* RAṄGA'YYA CHEṬṬI.

A document given to a witness as a script to refresh his memory is not "received in evidence" within the meaning of section 39 of Act VIII of 1859, and need not therefore have been produced when the plaint was filed.

In an action by the vendee against the vendor for breach of a contract to deliver goods "in two or three days,":—*Held* that the measure of damages was the difference between the contract-price and the price which similar goods bore on the lapse of a reasonable time for delivery, not less than three days from the date of the contract.

1863. Jan. 22, 27 & 28. O. S. No. 11 of 1862.

THE plaintiff claimed rupees 35,090, the difference between the market-price, at rupees 220 per khaṇḍi (500 lb) and the contract-price of 300 bales of western cotton, weighing 180 khaṇḍis, sold to him by the defendant on the 2nd of July 1862 at 115-8-0 rupees per khaṇḍi, and of 100 bales of the same cotton, weighing 60 khaṇḍis, sold on the 13th of July 1862, at rupees 132 per khaṇḍi.

It appeared from the evidence that there were three contracts between the parties. The first, entered into on the 25th of June 1862, was for 200 bales; the second, on the

(a) Present Scotland, C. J. and Bittleston, J.

2nd of July was for 100 bales; and the third, on the 11th July, was for 100 bales. None of the contracts were in writing; but it was proved that the agreement in each was that delivery should be made "in two or three days" from the date thereof.

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Under the first contract 197 bales of white cotton were with the assent of the buyer, delivered between the 15th and the 20th of August 1862; and it appeared that by mutual assent the matter was kept open till the end of August. Then the defendant tendered a further quantity of cotton. The plaintiff went to his screw-godown, where certain bales were shewn him. These were found to contain inferior white western cotton : the others were red. The plaintiff accordingly refused to receive them, whereupon the defendant said to him, "If you don't choose to have that you may go elsewhere."

The Advocate General, Norton and *Mayne* for the plaintiff.

Branson and *Arthur Branson* for the defendant.

A book of the plaintiff's, containing a memorandum of one of the contracts, had not been produced in Court when the plaint was presented. And in the course of the case, *Norton,* while examining the plaintiff, was about to put the book into his hand that he might use it as a script to refresh his memory with respect to the contract, when

Branson objected that this was merely a mode of giving evidence of the contents of a document which ought to have been, but was not, produced when the plaint was presented. Section 39 of Act VIII of 1859, enacts that such a document shall not be received in evidence on behalf of the plaintiff at the hearing of the suit without the sanction of the Court; and in the present case such sanction had not been obtained and ought not to be given. He also referred to section 128 of the same Act, which provides that "no documentary evidence of any kind [not produced at the first hearing], which the parties, or any of them, may desire to produce shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing."

1863. Jan. 22, 27 & 28. O. S. No. 11 of 1862.

SCOTLAND, C. J :—The sections relate to documents relied upon as themselves evidence in support of the case of the respective parties. For the purpose of respecting the memory of a witness a document may be used which is not evidence in itself; and on the present occasion it is sought to use the memorandum only as a means of refreshing the memory of the witness and not as evidence in itself. We cannot therefore, I think, say that it is "received in evidence" within the meaning of the sections.

BITTLESTON, J. concurred, and the objection was overruled.

The case then proceeded, and resulted in a judgment for the plaintiff. The following is such portion of the Chief Justice's judgment as related to the rule for measuring the damages awarded.

SCOTLAND, C. J.:—This is an action by the vendee against the vendor for not delivering cotton, and the only point of law which calls for our decision is what is the rule as to damages for breach of a contract to deliver goods "in two or three days" from the date of the contract? Where a time for delivery is fixed the rule in such cases is that their measure is the difference between the price agreed on and that which goods of a like description and quality bore at the time when the goods contracted for ought to have been delivered. When no time is fixed for delivery, then we must consider the price at which similar goods could have been obtained on the lapse of a reasonable time for delivery *(a)*. In the present case we think the question simply is whether a reasonable time had elapsed? For the expression "two or three days", under the circumstances in evidence here, means, I think, a reasonable time not less than three days. It clearly does not mean a specific time terminating at the end of three days; and we cannot hold that the mere fact of non-delivery within two or three days is such a breach as to require the measure of damages to be ascertained by reference to the price of cotton on the day after the three days had expired. The parties I think, intended that a reasonable time for delivery should be allowed.

Damages were assessed at Rs. 32,690, with costs, nine days being allowed as a reasonable time for delivery.

(a) See *Mansuk Dás* v. *Rangayya Chetti supra*, p. 162.

Original Jurisdiction (a)

Ecclesiastical Side.

In the Goods of SIMPSON deceased.

Where letters of administration which had been granted to the Administrator General of Madras were recalled, and he had merely taken manual possession of cash, Government promissory notes and the title-deeds of leaseholds belonging to the deceased, the High Court, under section 22 of Act VIII of 1855, allowed him commission, at the rate of 2½ per cent., on the cash and the value of the notes, but refused to allow it on the leaseholds.

1863. *January* 30.

MAYNE moved under section 21 of Act VIII of 1855, that an order might be made, revoking the letters of administration to the estate and effects of Aitken Megget Simpson, formerly of Madras, but late of 9 Merchiston Park, Edinburgh, deceased, granted to the Administrator General of Madras; and that letters of administration to the said estate and effects of the said A. M. Simpson (with his will annexed) within the jurisdiction of this Court might be granted to James Short, Esq., as the attorney of the trustees and executors in the said will named.

The following facts appeared from Mr. Short's petition on which the motion was grounded.

Mr. A. M. Simpson, formerly of Madras, a British subject residing in Edinburgh, died there on the 3rd of July 1862, having by his will, dated the 28th of June 1862, appointed four persons sole general disponees in trust and execution thereof.

The testator left property to be administered within the ordinary original jurisdiction of this Court, consisting of cash, Government promissory notes, leasehold lands and stock in trade.

In October 1862, the Administrator General of Madras, Mr. J. Miller, applied for letters of administration to Mr. Simpson's estate, and thereupon received notice from Messrs. Binny and Co. of Madras, that Mr. Simpson had left a will, that they had been requested to administer to the estate, and that they had sent home the instructions necessary to enable the executors to empower them to do so.

(a) Present Scotland, C. J. and Bittleston, J.

1863. *January* 30.

Mr. Miller, however, told Messrs. Binny and Co. that he was bound by the Act to proceed, and did not withdraw his application; and on the 3rd of November 1862 letters of administration to Mr. Simpson's estate and effects were granted by this Court to the Administrator General.

The trustees and executors reside in Scotland; and by a deed-poll, dated the 8th November 1862, they constituted the petitioner Mr. James Short of Madras their attorney to establish proper titles in their persons as general disponees and executors as aforesaid to the lands, hereditaments, debts, chattels and effects, real and personal, which belonged to the testator.

On the 11th of December 1862, Messrs. Ritchie and Shaw, Mr. Short's proctors, gave notice to the Administrator General that they had in their possession the testator's will and intended to apply immediately for the order now moved for. They also intimated that Mr. Short would pay all costs thitherto incurred by the Administrator General.

Nothing however, resulted from this notice; and on the 24th of January 1863, Mr. Ritchie, of the firm of Ritchie and Shaw, addressed the following letter to the Administrator General:—

" MADRAS, 24*th January* 1863.

MY DEAR SIR,

With reference to my conversation with you yesterday on the subject of Mr. Short's application for the revocation of the letters of administration granted to you in Simpson's estate, and with a view to save the expense of taking in counsel on each side on this application, he will agree to your retaining 2½ per cent. commission on the Government Promissory Notes and cash recovered by you and in your hands, but no commission on the lands and other estate.

If you agree to this, please say so at once: if not I am instructed to withdraw this offer, and the question of your commission in this case must be left to the Court.

Your's faithfully,

(Signed) A. M. RITCHIE."

J. Miller, Esq.

The Advocate General, Norton, and *Branson* for the Administrator General. 1863. *January* 30.

The argument turned altogether on the construction of the following sections of Act VIII of 1855 (" An Act to amend the law relating to the office and duties of Administrator General.") :—

XXI. If an executor or next of kin of the deceased, who shall not have been personally served with a citation, or had notice thereof, in time to appear in pursuance thereof, shall establish to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator General, any letters of administration which shall be granted by virtue of this Act to the Administrator General, may be recalled and revoked, and probate may be granted to such executor, or letters of administration granted to such other person as aforesaid. Provided that no letters of administration, which shall be granted to the Administrator General, shall be revoked or recalled for the cause aforesaid, except in cases in which a will or codicil of the deceased shall be proved, unless the application for that purpose shall be made within one year after the grant to the Administrator General, and the Court shall be satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application shall be made.

XXII. If any letters of administration, which shall be granted to the Administrator General in pursuance of this Act, shall be revoked, the Court may order the costs of obtaining such letters of administration and the whole or any part of any commission which would otherwise have been payable under this Act, together with the costs of the Administrator General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator General out of any assets belonging to the estate.

XXVI. The Administrator General of each of the said Presidencies under any letters of administration which shall be granted to him in his official character, or under any probate which shall be granted to him of a will wherein he shall be named as executor by virtue of his office, and the

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Administrator General of Madras under any letters of administration which are vested in him by Section V of this Act, shall be entitled to receive a commission, at the following rates respectively; *viz.*

The Administrator General of Bengal at the rate of 3 per cent. and the Administrator General of Madras and Bombay respectively at the rate of 5 per cent. upon the amount or value of the assets which they shall respectively collect and distribute in due course of administration.

XXVII. The commission to which the Administrator General of each of the said three Presidencies shall be entitled, is intended to cover not merely the expense and trouble of collecting the assets, but also his trouble and responsibility of distributing them in due course of administration. It is therefore enacted, that one half of such commission shall be payable to and retained by such Administrator General upon the collection of the assets, and the other half thereof shall be payable to the Administrator General who shall distribute any assets in the due course of administration and may be retained by him on such distribution. The amount of the commission lawfully retained by an Administrator General upon the distribution of assets shall be deemed a distribution in the due course of administration within the meaning of this Act.

SCOTLAND, C. J.:—We have given this case our best consideration, and have come to the conclusion, that as respects the Government promissory notes and the cash, the Administrator General is, but as respects the leaseholds, he is not entitled to commission. That, substantially, is the result at which we have arrived.

The first question is as to our jurisdiction under section 21 to recall the Administrator General's letters of administration, and to grant probate or letters of administration to the executor or next of kin of the deceased. Our discretionary power to recall letters granted to the Administrator General, where no will or codicil is proved, depends on two points—first, whether or not the application to revoke is made within one year after the grant to the Administrator General; and, secondly, whether or not there has been unreasonable delay

in making the application, or in transmitting the authority under which such application is made. But in the present case there is a will, and under the circumstances before the Court it is clear that the letters of administration granted to the Administrator General must be recalled and revoked. Then the 22d section provides that on such revocation we may order the Administrator General's costs of obtaining the letters of administration, and the whole or any part of the commission to which he would otherwise have become entitled under the Act, together with the costs of any proceedings to obtain such revocation, to be paid to or retained by him out of the assets. Then the 27th section, after stating what expenses and trouble the commission is intended to recoup and remunerate, enacts that one-half of such commission shall be payable to and retained by the Administrator General upon the collection of the assets, and the other half shall be payable to the Administrator General who shall distribute assets and may be retained by him upon such distribution. Now, unless Mr. Norton's argument be well founded, there can be no doubt that the general jurisdiction given to the Court by the 22nd section continues to exist, though here the Administrator General has retained the commission. Mr. Norton argues that if the Administrator General is in a situation to retain his commission, the court has no jurisdiction to interfere but it is quite clear, I think, that the discretion given by section 22 applies to cases coming within section 27. 1863. *January* 30.

Then as to the question respecting what was meant by "collecting the assets." There is no doubt that the word "assets" includes leaseholds as well as cash and promissory notes. But then has there been any 'collection' of these leaseholds and notes? It cannot, I think, be reasonably said that there may not be cases where assets have been collected though they have not been realized by sale or by actual receipt or possession. On the other hand, it cannot be doubted that where they have been realized ready for distribution, they may equally be said to be collected. It seems to me that under sections 22 and 27 the question is one for the discretion of the court, and that in the present case the claim as regards the Government promissory notes, and as to the leaseholds must be dealt with differently. Now it is import-

1863. January 30. ant to see for what the commission is given. Section 27 declares that it is intended to cover not merely the expense and trouble of collecting the assets, but also his trouble and responsibility in distributing them in due course of administration. It is conceded that if cash or bank notes had been left in the testator's chest, and the Administrator General had done nothing more than open the chest and take them out, he would have been entitled to commission, for as to such assets nothing would remain to be done but to distribute them to the persons entitled. But then it is contended that Government promissory notes are choses in action, and that until they have been realized, no commission can become receivable. I have already said that a 'collection' of assets does not necessarily involve their realization; and I think we must hold that these notes have been collected within the meaning of the section, so as to entitle the Administrator General to commission. There does not appear to have been any 'expense,' but there has been the trouble of applying for and obtaining actual possession of the notes. I cannot see any substantial difference between the case put of taking bank-notes or cash out of a chest and obtaining possession of these Government promissory notes. The commission is resisted on the ground that they have not been converted; but when one looks at their nature and the fact that they can at once be sold in the market, it would be drawing quite too fine a distinction if we made any difference between these notes and the others. I therefore think the Administrator General entitled to the commission of 2½ per cent on the Government promissory notes.

With regard to the leaseholds I think the claim to commission is not brought fairly within the provisions of the 27th section. What 'expense' or 'trouble' has the Administrator General incurred in reference to these leaseholds? The evidence shews that all he did was to take the title-deeds which were handed over to him. He incurred no 'responsibility' by so doing. As regards these deeds he becomes merely a conduit-pipe for the person obtaining probate. I think that in the exercise of our discretion we cannot allow the Administrator General commission in respect of the leaseholds. They cannot be considered as assets in collecting which he has incurred expense or taken trouble.

1863. *January* 30.

Then as to allowing the costs of obtaining the letters of administration. It has been urged that the Administrator General knew of the will. No doubt he did: Messrs. Binny and Co. gave him notice that Mr. Simpson had left a will: Mr. Miller replied that he was bound under the Act to proceed; and he did proceed accordingly. I am not prepared to say that strictly he was wrong. By section 11 of Act VIII of 1855 if no person shall within one month after the deceased's death have applied for probate or letters of administration, the Administrator General is *required* within a reasonable time after he shall have had notice of the death, to take proceedings to obtain letters of administration. And section 19 of the same Act expressly provides that no notice of a will shall affect the Administrator General unless within the period of one month from the time of giving such notice proceedings be commenced to prove the will or to cause the letters of administration to be revoked, nor unless such proceedings be prosecuted without unreasonable delay. I have further no reason to doubt that the Administrator General in what he did acted conscientiously; and under the circumstances I think his costs of obtaining administration should be allowed.

Then as to the costs of this application. Mr. Ritchie's letter of the 24th January 1863 offers the Administrator General exactly what we now give him, and it could hardly have been doubted that this was not a proper case for claiming strictly the 2½ per cent. on the leaseholds. I think Mr. Miller's costs of this application ought not to be paid out of the estate.

BITTLESTON, J.:—Two cases may arise upon this Act, under sections 26 and 27 of which the Administrator General is entitled to his commission at 5 per cent. payable at two different times, one-half upon the collection, the other upon the distribution of the assets. One case is where the assets are not only collected but fully administered; and in that case it is unlikely that any question should arise as to when the collecting could be said to be completed; for of course if he go on and distribute, he must previously have collected, and is entitled to the whole 5 per cent. The other case is where the Administrator General is, before distribution, interrupted by the revocation of the letters. Then it would seem that

1868. January 30. section 22 was introduced for the purpose of enabling the Court to exercise its discretion and to allow the whole or part of such commission as the Administrator General would have been entitled to in case there had been no revocation. Under that section, then, the Court must see, first, what the Administrator General would have had in the absence of revocation, and, secondly, what in the discretion of the Court he should now receive. Then was there a 'collection' of the Government promissory notes? Although I entertain some doubt as to whether they were 'collected' when merely taken into the manual possession of the Administrator General, yet considering their ready convertibility, I think, on the whole, they must be treated like other valuable chattels and therefore as having been 'collected.'

Appellate Jurisdiction (a)

Regular Appeal No. 26 of 1861.

KULA NA'GABU'SHANAM..............*Appellant.*

KULA SE'SHA'CHALAM..............*Respondent.*

Where in a suit to recover a sum of money on an award the five arbitrators came to a decision and made, dated and signed a rough draft of their award, and the defendant then withdrew from the submission, and a fair copy was then made, bearing the same date as that of the rough draft, but signed by only four of the arbitrators:—*Held*, that the award was complete at the date of the rough draft, and that its validity was not affected by the subsequent occurrences.

The validity of an award cannot be impeached because the arbitrators afterwards do an act required neither by the law nor the terms of the submission.

1868. January 31. R. A. No. 26 of 1861. THIS was a regular appeal from the decree of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 104 of 1859. This suit was brought on an award to recover rupees 3,622-2-0, with interest at the rate of 12 annas per cent. per mensem on rupees 1,930-9-0.

The Civil Judge, holding the award valid, decreed for the plaintiff.

Mayne (*Venkatarâyalu Nâyuḍu* with him) for the appellant, the defendant.

Branson for the respondent, the plaintiff.

The facts and arguments appear sufficiently from the judgment of the Court, which was delivered by

HOLLOWAY, J.:—This suit was brought to recover a sum of money upon an award.

(a) Present Strange and Holloway, J J.

The only substantial plea in the lower court was that the defendant had withdrawn from the submission to arbitration previously to the making of the award.

The Civil Judge of Masulipatam considered it established by the evidence that the award had been completed, and a rough draft of the decision made, previously to the defendant's withdrawal; and as against this defendant he found, substantially, for the plaintiff with costs.

The leading counsel for the appellant, in his very ingenious argument, contended that the weight of evidence was clearly in favour of the proposition, that the fair copy of the award which was signed by four out of five of the arbitrators, was not made until after the withdrawal, and that as a plain proposition of law, the fair draft was the award, and that no other evidence whatever was admissible upon the subject. We intimated during the argument that, the submission to arbitration containing no specification of any particular method of awarding, the question to be decided upon the evidence was whether or not the arbitrators had in truth arrived at a final decision upon the question submitted to them, previously to the announcement of the defendant's withdrawal; for if so we felt clear that the effect of that decision would not be neutralized by the circumstance that the fair copy was executed subsequently. The evidence given by the arbitrators' first and second witnesses, is that they met several times, came to a decision, reduced that decision to writing, and then transmitted it to the gumáshta, another of the plaintiff's witnesses, for the making of a fair copy.

The third witness called by both parties distinctly shows that the decision had in fact been come to and that the arbitrators conceived the decision final upon the matter submitted, for when asked by him with reference to their intention to furnish each party with a copy, why they could not let the matter alone when the defendant refused to have anything more to do with it, they answered "no: we have come to a decision, so we will offer a copy to each party." The third witness for the defence, also, called for both parties, says that he does not know whether or not the fair copy was written previously to the defendant's withdrawal. We consider that the weight of this evidence, as it appears to us wholly uncontradicted, shows that the arbitrators had

1863. January 31. R. A. No. 26 of 1862.

come to a decision upon the matters submitted to them previously to the letter withdrawing the submission. If nothing more existed the decision would be binding. The arbitrators then drew up a fair copy, affixing to it the same date as that to the original rough draft, thereby shewing the date at which they conceived their purely judicial functions to have ended. We are of opinion that a valid award having been made, its validity cannot be impeached because the arbitrators chose subsequently to do an act required neither by the law nor the terms of the submission. The fact that they did draw up the fair copy is merely evidentiary that the oral determination and the original rough draft were not and were not intended by the arbitrators to be a completed award. Looking at native practice in such matters, we consider that this fact is entirely outweighed by the evidence on the other side, that a valid award binding upon the parties was made, and that the judgment of the court below is right.

This decision upon the facts of the case renders it unnecessary to notice several questions upon the pleadings and the power of amendment which were ably argued upon both sides.

The result of our judgment is the dismissal of this appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 177 *of* 1861.

SRI'NI'VA'SA AYYAṄGA'R ....*Appellant.*
KUPPAN AYYAṄGA'R ....*Respondent.*

Special Appeal No. 182 *of* 1861.

RA'YAN KRISHNAMA'CHA'RIYA'R ....*Appellant.*
KUPPANAYYAṄGA'R ....*Respondent.*

A member of a Hindú family cannot as such inherit the property of one taken out of that family by adoption.

The severance of an adopted son from his natural family is so complete that no mutual rights as to succession to property can arise between them.

***Special Appeal No.* 15 *of* 1859 affirmed.**

1863. January 31. SS. AA. Nos. 177 and 182 of 1861.

THESE were special appeals from the decision of G. H. Fullerton, the Officiating Civil Judge of Chingleput, in Appeal Suits Nos. 104 and 105 of 1861.

(a) Present Strange and Holloway, J. J.

Branson for the appellant the fourth defendant, in Special Appeal No. 177.

1868. *January* 31. *SS. AA. Nos.* 177 *and* 182 *of* 1861.

Saḍagópáchárlu for the respondent, the plaintiff in both appeals.

Tirumaláchár iyár for the appellant, the fifth defendant in Special Appeal No. 182.

The facts appear from the following judgment, which was delivered by

STRANGE, J. :—The property in dispute was vested in one Jánaki Ammáḷ. She mortgaged it to Chéchappa Náyakkan the ancestor of the first, second and third defendants. Jánaki Ammáḷ adopted one Rágava Aiyan who died unmarried. The plaintiff as brother of Raṅga Aiyan, the natural father of Rágava Aiyan, sues to redeem this property as heir of Rágava Aiyan in default of issue from him.

The mortgagees offer no objection to giving up the property to the rightful heir on discharge of their lien.

The fourth defendant claims to succeed as cousin of Jánaki Ammáḷ's husband, and the fifth defendant does so as fosterson of Raṅga Aiyan.

The District Munsif gave judgment in the plaintiff's favour, and his decision has been affirmed by the Acting Civil Judge.

The prominent question to be decided in this suit is whether a member of the natural family can succeed to one taken out of the family by adoption? The settlement of this question depends upon whether the severance of the person adopted from his natural family is so complete that no mutual rights between them to property, in succession the one to the other, can arise, or whether the severance is not so thorough a one as to shut out such succession the one to the other.

In *Special Appeal No.* 15 *of* 1859(*a*), this question came before the late Ṣadr Court, when it was sought to establish the succession of a person adopted to his natural

(*a*) M. S. D. 1859, p. 81.

1868. January 31. SS. AA. Nos. 177 and 182 of 1861.

brother. The paṇḍits, relying on the reasoning of Çrí Ráma Paṇḍita(a), asserted that the right of succession did exist. But the Court, after examining the basis of their opinion and other law authorities, were satisfied that the gift made of one for adoption created an entire and irrevocable severance of him from his natural family.

We are of opinion that the above decision is founded upon a just appreciation of the principle of an adoption, whereby the son of one man ceases to be such in the eye of the law and becomes the son of another man, inheriting thenceforth in his adoptive family and having no more rights in his own family. If it would be a violation of that principle to allow a person adopted to return to his natural family and take up their rights, it would be a still greater violation thereof to introduce to the rights in the adoptive family the natural kindred of the adopted person, who assuredly never had any part or title in the adoptive family or in their possession.

We observe, furthermore, that in the Mitákshará, the great authority in this Presidency on the law of inheritance, no place has been given in the natural family for the re-introduction into the line of heirs of one taken out of that family by adoption, and none in the adoptive family for the admission of those in the natural family.

We conclude, therefore, on all these grounds that the plaintiff has no title to represent the late Rágava Aiyan, and we consequently reverse the decrees below and dismiss the suit with costs.

Appeal allowed.

NOTE.—See Manu, IX, 142: *Dattaka-Mímánsá*, VI, 6, 7: *Dattaka-Chandriká*, II, 18, 19: Sutherland, Adoption, p. 229: *Mitákshará*, chap. I, sec. XI. § 32: 3 Coleb. Dig. 147, 148: *Vyavahára Mayúka*, chap. IV, section V, §§ 21, 23: *Crastnarao's Case*, Perry's Or. Ca. 156.

When an adopted son dies without issue property which he has inherited from his adoptive father goes to the natural heirs of the latter S. A. No. 71 of 1858. M. S. D. 1859, p. 265.

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ADDENDA AND CORRIGENDA.

Page 190 line 12 from bottom, *for* ' Cause Courts' *read* ' Causes Court.'
„ 200 „ 19 *for* ' Jurissdiction' *read* 'Jurisdiction.'
„ 206 „ 18 *for* ' Námagiripettai' *read* ' Námagiripéttai.'
„ 212 in margin, line 2 from bottom *for* ' *Case*' *read* ' *R. C.*'
„ 221 line 18 from bottom *for* ' wcll' *read* ' well.'
„ 241 „ 10 *for* ' Miyari Ramatívári' *read* ' Maiyári Rámadevari,' line 11 *for* ' Sandiramie Pattya' *read* ' Sandirami Páttya.'
„ 257 note *add* ' And see *Mt. Imam Bandi* v. *Hurgovind Ghose* 4 Moo. I. A. C. 403 : *Doe* v. *E. I. Co.*, 6 Moo. I. A. Ca. 267.'
„ 283 line 20 *add* ' *Norton* contended that the gardens in question were state property, and also that the gift was void as there was no seisin, nor anything tantamount thereto : *Sadagopachárlu's Manual of Muhammadan Law,* § 102, *Elberling on Inheritance, &c.* § 258 : *Macnaghten's Principles of Muhammadan Law,* chap. V, sec. 2.
Branson replied.
„ 306 line 3 *after* ' am' *insert* ' of.'
„ 326 „ 11 from bottom read *-nattinér'pádu.*

Appellate Jurisdiction (a)

Special Appeal No. 563 *of* 1861.

KAMPILIKARIBASAVAPPA..............*Appellant.*
SOMASAMUDDIRAM........................*Respondent.*

An adjustment of accounts may be proved by oral evidence.

THIS was a special appeal against a decree of P. Irvine, the Civil Judge of Bellary, in Appeal Suit No. 32 of 1860 affirming the decision of the Acting Principal Sadr Amín of Bellary, in Original Suit No. 10 of 1860, who had dismissed the plaintiff's claim for rupees 2,961-14-11, being the balance due on a settlement of accounts. The ground taken by the Civil Judge was that an adjustment of accounts could not be proved by oral testimony.

1863. *February* 2. *S. A. No.* 563 *of* 1861.

Branson for the appellant, the plaintiff.

Norton for the respondent, the defendant.

PER CURIAM:—Of all cases in which oral evidence is admissible, this is one in which its admission is most clear and unobjectionable. With this observation the case will be remanded for disposal on the merits.

(a) Present Scotland, C. J. and Holloway, J.

NOTE.—The same point was decided at the same time in *Special Appeal No.* 587 *of* 1861 in which the appellant in *S. A. No.* 563 *of* 1861 was the respondent and the respondent the appellant.

Appellate Jurisdiction (a)

Special Appeal No. 1 *of* 1862.

MUNIYAN..................................*Appellant.*

PERIYA KULANDAI AMMAI...........*Respondent.*

Execution cannot be obtained on a merely declaratory decree.

1863. *February* 2. *S. A. No.* 1 *of* 1862.

THIS was a special appeal from the decision of Charles Collett, the Acting Civil Judge of Chittúr, in Appeal Suit No. 167 of 1861, affirming in substance the judgment of Krishnamáchári, the District Munsif of Tiruvallúr, in Original Suit No. 587 of 1860. The suit was brought to establish the right of the plaintiff to one-fourth of a karai of lands as being her property. The plaint stated that the plaintiff and the first defendant the mother of the second and third defendants, were sisters; that the paṭṭá of the half karai of the land thereunder mentioned was issued in the names of the second and third defendants; that one-fourth karai thereof was acquired by the plaintiff's husband and was in her own possession, and that therefore the paṭṭá of the said land should be issued in her name and the land enjoyed by her. The defendants in their kaíflyat stated that the one-fourth karai of land mentioned in the plaint was not acquired by the plaintiff's husband, nor was it enjoyed by the plaintiff, and that it belonged to the defendants and had for the last six years been cultivated by the plaintiff's son-in-law (*mar'umagan*). The District Munsif in substance decided in favour of the plaintiff and ordered that a paṭṭá should be issued in her name. On appeal the Civil Judge affirmed the judgment of the Court below in substance by declaring the plaintiff to be of right entitled to the lands, but modified it so far as in form it ordered that a paṭṭá should be issued in the name of the plaintiff. The following is an extract from the Civil Judge's judgment:—

"The great difficulty I have had in disposing of this appeal has arisen from the extraordinary form in which the suit has been brought, and the no less extraordinary judgment pronounced in it. The plaint is loosely and inaccurately framed, but in effect the prayer is that the paṭṭá of

(a) Present Scotland, C J. and Holloway, J.

certain lands standing in the name of the second and third defendants, but of right belonging to, and in the possession of, the plaintiff, may be cancelled, and a new paṭṭá for the same issued in the name of the plaintiff.

"The judgment in paragraph 6 expressly orders that a new paṭṭá shall be issued accordingly. Obviously the court has no means to enforce the execution of such an order. The issue of a paṭṭá is a matter within the discretion of the revenue-authorities. I am not to be understood as meaning that there could never be a suit or a decree for the issue of a paṭṭá in the name of a plaintiff. It would not be difficult to suggest such a case, but then the proper revenue-authority ought to be a party.

"A plaint framed like the present is clearly open to a demurrer: a decree in form such as the present is incapable of being executed. It is true that the parties, neither originally nor in appeal, have taken the objection which has suggested itself to me; but I do not think that this is such an objection as falls within the principle of the case reported in 3 Moore's I. A. C. 278. I infer from what fell from Sir John Coleridge during the argument of *Fischer* v. *Kamala Naicker(a)* that there are some objections which the court may take notice of, though they are not raised by the parties themselves. I think the present judgment is, in the words of the Master of the Rolls in *Morris* v. *Chambers(b)*, "encumbered with this difficulty that the declaration and "decree of the court may be a mere *brutum fulmen*, inca- "pable of being practically enforced against the defendant." Where that is so, the Lord Chancellor, on the same case coming before him on appeal, remarked, that the court ought not to pronounce a decree even in personam*(c)*. I have therefore anxiously endeavoured to see whether, obeying the spirit of section 350 of the Code of Civil Procedure, I may not in the present case overlook the defect in the form of the decision below, and dispose of the suit upon an issue free from objection in respect to form, and which in substance has been duly raised, and really embodies the whole matter in dispute between the parties. Now I think there is such

(a) 8 Moor. I. A. C. 182. (b) 7 Jur. N. S. 60.
(c) 7 Jur. N. S. 690.

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an issue in the present case, and that is, whether the plaintiff is of right entitled to the lands in the plaint mentioned ?

"This issue was certainly raised in the court below; not so in due form, indeed, for the Munsif adhered to the old procedure instead of the new, and did not settle issues, but the first point he gave to the plaintiff was to prove that the lands belong to her. Had the procedure been proper, the issue I have stated must have been that settled. In the appeal it is obviously the substance of the objections to the court's decree. Really the object of the suit was to establish the plaintiff's title to the lands, and a decision upon the issue of title or no title in the plaintiff must dispose of the whole dispute between the parties. It is true that the plaintiff alleges and the defendants deny that she is in possession of the lands. But except so far as the fact of possession is any ground for presuming a right of property, the fact itself may be disregarded. If the plaintiff is in possession and I decide the issue of right in her favour, then the decree will be simply declaratory, and that section 15 of the Code allows: if she is not in possession, then the decree would be executory, and she may enforce execution of it. But there cannot be a decree declaratory merely of the fact of possession; and I think that in a suit like the present, the fact of possession is a mere matter of evidence proper to be adduced in support of the issue of right, but that there ought not to be any issue settled as to this mere fact itself. Then as to the sole issue upon which I propose to dispose of this appeal, I am of opinion that, viewing the judgment below as a declaration of the plaintiff's right to the land, it ought to be affirmed."

The second defendant appealed against the Civil Judge's decree on the following grounds.

" 1. It is contrary to law in that,

1st. Judgment was given in plaintiff's favour, upon evidence inadmissible in law, and found by the Civil Judge to be unsatisfactory and useless.

2nd. Plaintiff had to stand or fall upon the strength of her own evidence. After finding that her evidence did not

agree with her claims, the lower courts made a mistake in having entered into an enquiry of the defendant's title, and gone upon the weakness of his evidence.

3rd. The fact that the suit is barred by the statute of limitation, as the defendant holds adverse possession since 1845, was overlooked by the lower courts.

4th. The rulings of the Ṣadr Court, which declare that a party who once relinquishes the land or leaves it uncultivated without any reasons, &c., cannot get it back, after the same was duly transferred by paṭṭá to another ryot, were not observed by the lower courts.

5th. The Civil Judge made an error in assuming that the possession by the plaintiff's *mar'umagan* was tantamount to her possession.

2. It is defective in the investigation of merits, so as to affect the decree in the decision of the material points in that,

1st. The question in whose possession the lands are now remaining, was not decided.

2nd. The question, whether the plaintiff's *mar'umagan* has not been in possession of a portion of the lands under the sufferance of the defendants, was likewise left undisposed of."

Srínivásáchárlu for the appellant, the second defendant.

The following judgment was delivered by

SCOTLAND, C. J.:—In this case we are of opinion that the learned Civil Judge, having decided that the plaintiff was entitled to a declaration of title, acted rightly in confining the decree in the suit to a mere declaration of the plaintiff's title to the land in question; and for the reasons given at the hearing we think the grounds of appeal fail, and that the appeal must be rejected with costs to be paid by the defendants. It would not have been necessary to say more but for a passage in the judgment of the Civil Judge in which we observe he says when alluding to the question of possession "if she (the plaintiff) is not in possession then the decree would be executory and she may enforce execution of it."

1868. February 2. S. A. No. 1 of 1862.

Although there is nothing in this case (notwithstanding that the question of disputed possession is not clearly dealt with) to lead us to the conclusion that any right to the land by mere possession has been acquired, still cases may easily be supposed in which declaratory decrees as regards title might be obtained collusively, without regard being had to valid legal rights acquired by long possession; and to allow possession in such cases to be obtained by means of execution upon a mere declaratory decree, would be to permit parties in possession to be improperly deprived of their legal possessory rights by the process of the Court. No such execution can properly be obtained upon a declaratory decree. It amounts to a binding declaration of the title decided upon and no more, as between the immediate parties to the suit, and does not in any case entitle the party obtaining it to execution for the delivery over of possession of the property in question. If then the learned judge meant to decide that the plaintiff was at liberty if she thought it necessary, to obtain execution upon the decree for the delivery to her of possession, we think he was in error, and that no such execution ought to be allowed.

We are not to be understood from the observations just made, as in any way deciding that this was a case in which substantially upon its merits, the Civil Judge was properly required to make a declaration of title under section 15 of the Civil Procedure Code. The point was not raised, and the circumstances before us do not make it necessary to say anything upon it.

Appeal dismissed with costs.

Appellate Jurisdiction (a)

Special Appeal No. 41 *of* 1862.

CHIDAMBARA PILLAI..................*Appellant.*
KA'MAN..................................*Respondent.*

Where a decree is passed *ex parte* in an original suit the defendant has no right to a special appeal, even though his appeal have been entertained by the Civil Court.

THIS was a special appeal from a decree of J. W. Cherry, the Civil Judge of Salem, in Appeal Suit No. 159 of 1860, affirming the decree of W. Hodgson, the Subordinate Judge of Salem, in Original Suit No. 43 of 1853. The suit was brought to recover certain málguzárí nañjey lands, consisting of acres 10-1-11, producing annually rupees 250 and assessed at rupees 107-10-9.

1863. *February* 2. *S. A. No.* 41 *of* 1862.

The case was heard *ex parte* as regarded the fifth defendant, and the Subordinate Judge decreed for the plaintiff.

Ritchie for the appellant, the fifth defendant.

Sadagópáchárlu, for the respondent, the plaintiff objected that, as the special appellant was *ex parte* in the original suit, he could not, under section 119 of the Code of Civil Procedure, be allowed to appeal. That section enacts that 'no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside.'

Ritchie: As the appellant has been allowed to appeal to the Civil Court against the original decree, it is too late to object to the special appeal. The objection must be regarded as waived.

SCOTLAND, C. J.:—I cannot see how the objection can be got over. The defendant had the opportunity of appearing, but did not do so. The original decree was passed *ex*

(a) Present Scotland, C. J. and Holloway, J.

1863. February 2. S. A. No. 41 of 1862.

parte. Then under section 119 he might have applied within thirty days to set aside such decree if he had any sufficient cause to assign. He did not do so. But it is said that inasmuch as he appealed to the Civil Court, and his appeal was then entertained, therefore we ought to admit a special appeal from the decree of the Civil Judge. But the Civil Judge's assumption of jurisdiction is no reason why we should assume it if we see, as we do here, that the party has no legal right to appeal.

HOLLOWAY, J.:—This is a special appeal from a matter *coram non judice.* The Civil Judge had no jurisdiction to entertain the appeal. He was not hearing it as Civil Judge. The present appeal must be dismissed.

Appeal dismissed with costs.

Appellate Jurisdiction (a)

Referred Case No. 4 *of* 1863.

RA'MASVA'MI CHETTI and others *against* PA'PPA' REDDI.

The security bond executed by a third party to the ábkárí renter is not exempt from stamp-duty.

1863. February 2. R. C. No. 4 of 1863.

CASE referred by R. J. Melville, the Acting Judge of the Small Cause Courts at Chittúr, for the decision of the High Court.

No counsel were instructed.

The facts sufficiently appear from the following

JUDGMENT:—The question is whether the security bond executed by a third party to the ábkárí renter is exempt from stamp duty.

The Regulation I of 1820 has no reference to such an instrument, and it does not seem to us to fall within any of the exemptions as respects bonds in Schedule A, Act XXXVI of 1860, which upon the case as stated, we take to be the Stamp Act in force when the bond was given.

(a) Present Scotland, C. J. and Holloway, J.

It is quite clear that the mere fact of an agreement between a sub-renter and a renter being exempt from a stamp does not affect the question. The renter for his own benefit seeks this collateral security for the fulfilment of the sub-renter's contract; and he might, at pleasure, dispense with it. It is strictly therefore a contract between private persons, to which the Stamp Act in force at the time of its being entered into, applies. The bond, therefore, we think was not exempted from a stamp.

1863. *February* 2. *R. C. No.* 4 *of* 1863.

Appellate Jurisdiction (*a*)

Referred Case No. 5 *of* 1863.

CHINNASVA'MI HAWA'LDA'R *against* ANONYMOUS.

Before granting the copy of the judgment and the certificate required for enforcing any portion of a judgment by execution against the debtor's immoveable property, a Small-Causes Court should be satisfied that such moveable property of the debtor as is within its jurisdiction has been sold in execution.

1863. *February* 2. *R. C. No.* 5 *of* 1863.

CASE referred for the decision of the High Court by R. B. Swinton, the Judge of the Small Causes Court at Tanjore. The question was whether the Judge was authorized by section 11 of Act XLII of 1860 (the Small Causes Courts Act) to grant a certificate to a judgment-creditor, there having been no sale of the moveable property of the judgment-debtor? That section enacts that "in the execution of a decree under this Act, if after the sale of the moveable property of a judgment-creditor any portion of a judgment shall remain due, and the holder of such judgment desire to issue execution upon any immoveable property belonging to the judgment-debtor, the Court, on the application of such judgment-creditor, shall grant him a copy of the judgment, *and a certificate* of any sum remaining due under it, and, on the presentation of such copy and certificate to any Civil Court having general jurisdiction in the place in which the immoveable property of the judgment-debtor is situate, such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases." Section 13 of Act

(*a*) Present Scotland, C. J. and Holloway, J.

1863. February 2. R. C. No. 5 of 1863.

XXIII of 1861 provides that—" When a decree is passed in any suit of the nature and amount cognizable by Courts of Small Causes constituted under Act XLII of 1860, the Court passing the decree, whether such Court be a Court constituted as aforesaid or any other Court, may at the same time that it passes the decree, on the verbal application of the party in whose favour the decree is given, direct immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court passing the decree, or against the personal property of the judgment-debtor within the same limits. If the warrant be directed against the personal property of the judgment-debtor, it may be general against any personal property of the judgment-debtor wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment-debtor within the same limits, which shall be indicated by the judgment-creditor."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question referred by the Judge of the Court of Small Causes of Tanjore is whether under section 11 of Act XLII of 1860, it is competent to him to issue a certificate for the execution of a decree upon the immoveable property of the defendant, before an effort has been made to realize the sum decreed by execution upon the personal property of the debtor, and before the Court is satisfied that there is no such personal property.

The Small Causes Court is a Court of limited jurisdiction which is to be determined by the precise words of the Act which created it and the provisions regulating its procedure.

The Act (XXIII of 1861) which repealed section 10 of the Small Causes Courts Act (XLII of 1860), provides by section 13 for the issuing of execution by Courts of Small Causes against the person or the personal property of the judgment-debtor; and section 11 of Act XLII of 1860, which gives the right to proceed against the debtor's immoveable property, expressly makes the granting of the necessary copy

of the judgment and certificate conditional upon the moveable property being made available in execution upon the judgment. The application of the judgment-debtor is only to be where any portion of a judgment debt remains unsatisfied after the sale of the moveable property. It seems therefore clear that the Court should be satisfied that such moveable property of the judgment-debtor as is within its jurisdiction, has been sold in execution, *before* granting the copy of the judgment and the certificate required for enforcing any portion of the judgment by execution against the debtor's immoveable property.

1863. *February* 2. *R. C. No.* 5 *of* 1863.

Original Jurisdiction (a)

Crown Cases Reserved.

THE QUEEN on the prosecution of the MADRAS RAILWAY COMPANY *against* MALONY.

THE QUEEN on the prosecution of the MADRAS RAILWAY COMPANY *against* JONES.

The drunkenness of a guard or underguard in charge of a railway-train or any part thereof is an offence included in sec. 35 of Act XVIII of 1862; but the High Court has no jurisdiction to try a prisoner charged with such offence where he was removed from his post at a place outside the local limits, although the train thereupon proceeded with him to Madras.

1863. *February* 3.

THE prisoner Malony was indicted under the 27th section of the Indian Railway Act, and tried before Bittleston, J., by whom the following case was stated:

"James Malony was tried before me at a Criminal Session of the High Court holden on the 6th and four following days of January 1863, upon an indictment which charged that he on the 1st January at Madras, being a servant of the Madras Railway Company, was in a state of intoxication whilst actually employed upon the Madras Railway in discharge of his duty as a guard in a passenger's train, such duty being one, the negligent performance of which would be likely to endanger the safety of persons travelling on such railway.

(a) Present Scotland, C. J. and Bittleston, J.

1863. February 3.

"It was proved that the prisoner was a guard in the service of the Madras Railway Company, and that on the 1st January he was the head-guard in charge of a passenger-train from Coimbatore to Madras, that on the arrival of the train at the Arkónam Junction-station about 6 o'clock in the evening of that day, the prisoner was found in the break-van in a state of almost helpless intoxication, that he was removed from the train by the station-master, and detained at that station until the following morning, another guard being sent in charge of the train on its further journey to Madras.

"It was also proved that the head-guard in charge has the general controul of the whole train, starts it when everything is ready, and has charge of the front break; and that serious accidents might result either from his not applying the break when necessary or starting the train before everything was ready.

"The Arkónam Junction-station is not within the local limits of the ordinary original jurisdiction of the High Court; and the prisoner was proved not to be an European, but nothing further was known by any of the witnesses as to his birth or parentage.

"He was committed for trial to the High Court by a Police Magistrate and Justice of the Peace for the town of Madras.

"The jury found the prisoner guilty of the offence charged; but upon reference to Act XVIII of 1854, sections 27 and 30, Act XVIII of 1859, sections 1 and 2, Act XVIII of 1862, section 35, and to clauses 21 and 22 of the Letters Patent constituting the High Court, I doubted whether I had jurisdiction to try the case, and reserved that question for the opinion of the High Court.

"In the meantime I ordered that the prisoner should be released on entering into his own recognizance in rupees 500, with two sureties in the same amount, for his appearance on 3rd February next to receive judgment if called upon."

In *The Queen on the prosecution of the Madras Railway Company* v. *Jones* Bittleston, J., also stated a similar case, which arose out of an indictment under the 27th sec-

tion of the Indian Railway Act. The prisoner here, one Jones, was tried before his lordship at the first Criminal Sessions for 1863. It was proved that he was an under-guard in the service of the Madras Railway Company, and that on the 1st of January 1863 he was employed in that capacity on a passenger-train from Coimbatore to Madras. Upon the arrival of the train at the Arkónam Junction-station, about 6 o'clock P. M., he was drunk, violent and unsteady. To prevent his going on with the train, he was put in charge of a peon; but, as the train was starting, he broke away, jumped into it, and so was taken on to Madras. Two of the passengers who gave evidence of his intoxication at Arkónam stated that when the train reached the Perambore station the prisoner assisted in giving out the luggage, and then appeared to be steady and sober. It was proved that the under-guard has charge of one of the breaks, and that though the head-guard is answerable for starting the train, he is obliged to depend upon his under-guard for ascertaining that everything is secure in the part of the train which is under the more immediate observation of the latter. It was also proved that serious accidents might result from the negligent performance of the under-guard's duties.

1863. *February* 3.

Jones was stated by one of the witnesses to be an East Indian, and there was no other evidence of the prisoner's parentage or place of birth.

No counsel appeared for either of the prisoners, and the judgment of the Court was delivered by

SCOTLAND, C. J.:—The Act No. XVIII of 1862 was passed for the further improvement of the administration of criminal justice by simplifying and facilitating the mode of procedure; and the object of the 35th section is to remove doubts and inconveniences as regards the exact locality in which offences alleged to have occurred on a journey or voyage, have been actually committed or completed. That section enacts: "If any person shall be accused of any offence alleged to have been committed on a journey or on any voyage in British India, such person may be dealt with, tried and punished by any of Her Majesty's Supreme Courts of Judicature, if any part of the journey or voyage shall have been performed within the local limits of the jurisdiction of such Court."

1863. February 3. The question which the Court has now to decide is whether the section clearly gives jurisdiction to the High Court to try and convict the parties charged in either of the cases reserved for consideration; and we are of opinion that the section does not admit properly of such a construction. It is not improbable that the offence of drunkenness whilst on duty was not one of the offences contemplated when the section was framed: but the general language of the section is certainly sufficient to include such offence. Then the section applies if the offence of which the person is accused is "alleged to have been committed on a journey or on any voyage." Now the words "on a journey or on any voyage" must, we think, be read as if the provision had been whilst a journey or voyage or any part of it is being performed by a ship or carriage, without particular reference to the terminus, and so read together with the language of the rest of the section, the proper construction and effect of the enactment is that if a person is accused of an offence committed whilst a journey or voyage *is going on* he may be tried if any of that part of the journey or voyage during which the offence of which the person accused is alleged to have been committed is within the local limits of the Court's jurisdiction. Here the offence was committed by the party accused and was alleged to have been committed on the journey between Coimbatore and Arkónam, and the one prisoner was actually detained at Arkónam, and the other was put in charge of the peon to prevent his going further on the journey, but broke away and got into the train in his then intoxicated state, so that it cannot, we think, be said that any part of the journey on or during which this offence is alleged to have been committed by the accused, was performed within the local limits of the Court's jurisdiction. The journey on which the offence is alleged to have been committed ended, so far as regards the party accused and the offence, at Arkónam.

The very general terms of the section give rise certainly to some doubts and difficulty, and the considerations of convenience and inconvenience as regards the prosecution of offences committed on a journey, which have naturally occurred to us, do not so preponderate either way, as to assist materially in its construction. But looking to what

must have been the object and intention of the enactment and giving the ordinary meaning to the language of the section, we think our present construction is the proper and reasonable one. 1863. February 3.

The Court, therefore, we are of opinion, had no jurisdiction to try the offences charged in these cases, and the convictions must be quashed and the prisoners discharged.

Convictions quashed.

Appellate Jurisdiction (a)

Civil Petition No. 287 *of* 1862.

PARAVARTANI *against* AMBALAVANA PIḶḶAI.
Ex parte PARAVARTANI.

When a Hindú widow instituted a suit in respect of rights inherited by her from her deceased husband and then adopted a son:—*Held* that under section 73 of the Code of Civil Procedure the adopted son might be made a co-plaintiff.

THE original suit (No. 7 of 1857) was brought by a Hindú widow in the Civil Court of Madura to establish certain rights in respect of the Rámeçvara Devasthánam. The plaintiff was Rání Zamíndární of Rámnád: she had inherited the Zamíndárí from her deceased husband, and in right thereof she claimed to be dharmakartá of the devasthánam in question. After the institution of the suit she adopted one Muturámalinga Çetupati, and this petition was presented by her and the adopted son praying that the suit might be continued by the adopted son; or that he might be added as a supplemental co-plaintiff: but that if the Court should not grant either of the above applications, then that the suit might be continued in the name of the plaintiff and as it then stood instituted. 1863. February 7. C. P. No. 287 of 1862.

Branson for the petitioner.

Norton (*Mayne* and *Saḍagópácharlu* with him) for the counter-petitioners: Parties coming into existence after the commencement of the suit cannot apply to be admitted.

(a) Present Strange and Frere, J J.

1863. February 7. C. P. No. 287 of 1862.

Branson in reply: Granting that the interest must be in existence at the time of the filing of the plaint, the adoption here must be referred to the death of the plaintiff's husband. In the eye of the law, then, the adopted son was in existence before the institution of the suit.

STRANGE, J.:—Section 73 of the Code of Civil Procedure provides that if it appear to the Court, at any hearing of a suit that all the persons who may be entitled to, or who claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day, to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be. The Code does not admit of a supplemental plaint, but the terms of this section are very large, and I think we must hold that they authorise us to order that the adopted son be admitted as an additional plaintiff to the suit before us.

FRERE, J. concurred.

Ordered accordingly.

Appellate Jurisdiction (a)

Criminal Petition No. 101 *of* 1862.

Ex parte VI'RABUDRA GAUD.

The discretionary power given by law to examine a prisoner should be used to ascertain from him how he may explain facts in evidence appearing against him, not to drive him to make self-criminating statements.

1863. *February* 7. *Crim. P. No.* 101 *of* 1862.

THE petitioner, the sixth prisoner in Case No. 155 of 1862, Sessions Court, Bellary, was convicted by that Court of receiving with guilty knowledge property stolen in the commission of a dacoity. On the 15th November 1862 the High Court called for the record and suspended the sentence. The record was returned, and the case now came on for final disposal.

Branson and *Tirumaláchár iyár* for the prisoner.

The facts appear from the following

JUDGMENT:—The petitioner, the sixth prisoner in the case, has been sentenced to transportation for life, as a receiver of stolen property obtained by dacoity.

The evidence against him is that he has been found in possession of a quantity of gold bullion, showing traces of having been melted down from gold ornaments such as were stolen at the dacoity, and for the possession of which, he has been unable to account satisfactorily.

We are of opinion that this evidence is insufficient for the conviction of the prisoner upon the charge laid against him. Identification of gold thus melted down being impossible, it was necessary, in some direct manner, to connect the bullion found with the prisoner with the robbery, so as to warrant the reasonable conclusion that it formed part of what was stolen. There is no such connecting evidence; and it would be quite unsafe to decide that because this gold is of a suspicious description and its possession by the prisoner, in a lawful way, has not been properly accounted for, it formed in fact part of that particular property which was taken at the dacoity.

(a) Present Strange and Frere, J J.

1863. February 7. Crim. P. No. 101 of 1862.

Being thus unable to uphold the conviction of the prisoner, we set aside the sentence passed upon him, and direct that he be released.

We are constrained to observe that in the severe cross-examination which the prisoner has undergone before the Sessions Court, the proper limits for holding an examination of him have been greatly exceeded. The discretion given by the law for the questioning a prisoner, has not been allowed for the purpose of driving him to make statements criminatory of himself. This discretion can, we think, only be properly used for ascertaining from a prisoner how he may be able to meet facts in evidence appearing against him, so that these facts should not stand against him unexplained. It is declaredly within the competency of the accused to decline answering any question, while of course the Court is at liberty to weigh his answers whether they tell for him or against him.

Conviction quashed.

Original Jurisdiction.

Original Suit No. 73 *of* 1862.

WINTER *against* WAY.

A sued B for goods sold in Madras and delivered to B personally outside the local limits of the High Court's original jurisdiction. B dwelt outside those limits. The goods were sent to him at his request, sometimes by sea, sometimes through the Post-Office, but always at A's risk during the journey:—*Held*, that the suit must be dismissed for want of jurisdiction.

So long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee.

Dhollet v. *Russell* observed upon.

The Indian Government, like the Post Master General, is not responsible for loss or damage occurring to anything entrusted to the Post-Office for conveyance.

1863. February 2, 9. O. S. No. 73 of 1862.

THE plaintiff sued for rupees 346-9-2 and interest for goods sold and delivered.

The summons was served upon the defendant at Secunderabad where he had dwelt at and for some time previously to the filing of the plaint.

He did not appear in obedience to the summons, and the case was heard *ex parte* in chambers.

1863. February 2, 9. O. S. No. 73 of 1862.

No counsel appeared for the plaintiff.

The plaintiff proved the sale to the defendant at different times of various articles, all of which were delivered to him at places beyond the local limits of the High Court's original jurisdiction. The goods were forwarded to the defendant at his request, sometimes by sea, sometimes by banghy parcel through the Post Office; but however sent they were always at the risk of the plaintiff during the journey.

On February 9 the following judgment was delivered by

BITTLESTON, J.:—This is a plaint for goods sold and delivered, and as the defendant does not dwell within the local limits of this Court's original jurisdiction, it must be shown that the cause of action, the sale and delivery of the goods, took place within those limits. But it appears that in point of fact the delivery of all these goods took place at up-country stations; and the only question is whether the ordinary rule that the delivery of goods to a common carrier is a delivery to the consignee applies to this case. I was told that there had been a recent decision on the point by Mr. Justice Wells at Calcutta; and I allowed this case to stand over that I might refer to that decision. I have since seen a very imperfect newspaper report of the case of *Dhollet* v. *Russell*—from which I gather that in that case the party to whom the goods were delivered in Calcutta had been expressly made the agent of the defendant to receive delivery. The learned Judge took occasion to refer to the cases of *Dawes* v. *Peck(a)*, *Dutton* v. *Solomonson(b)* and *Brown* v. *Hodgson(c)* as establishing the general rule that ordinarily a delivery to a common carrier is a delivery to the consignee. But that this is not necessarily so is established by the later case of *Dunlop* v. *Lambert(d)* where all the previous cases were considered; and where it was held that it was a question for the Jury in such cases whether the goods were delivered to the carrier at the risk of the consignor or of the consignee; or "at whose risk were the

(a) 8 T. R. 330.
(b) 3 Bos. & P. 582.
(c) 2 Campb. 36.
(d) 6 Cl. & Fin. 600.

1863. February 2, 9. O. S. No. 73 of 1862.

goods carried," as was said by Parke B. in *Freeman* v. *Birch(a)*. Manifestly so long as the goods remain at the risk of the consignor they cannot have been delivered to the consignee ; and in this case the plaintiff himself expressly states that they remained at his risk throughout the journey, and until actually received by the defendant. It seems to me therefore in this case impossible to hold that this Court has jurisdiction. I would add also with respect to the mode of conveyance by banghy parcel—that there is a great difference between that and conveyance by a common carrier. A common carrier is by the law of England responsible for all losses unless occasioned by the act of God or the Queen's enemies; but the Post Master General is under no such responsibility. The Indian Post Office Act XVII of 1854, section 49 expressly provides that the Government shall not be responsible for any loss or danger which may occur in respect to anything entrusted to the Post Office for conveyance ;" and in England it has long been settled that the Post Master General is similarly exempt, notwithstanding the opinion of Lord Chief Justice Holt to the contrary. The present suit must be dismissed for want of jurisdiction.

Suit dismissed.

(a) 3 Q. B. Rep. 492.

Original Jurisdiction.

Original Suit No. 36 *of* 1862.

WINTER *against* ROUND.

Where the payee sued the maker of a note which was dated " Madras 27th September 1860" and delivered to the plaintiff at Madras :—*Held*, that the High Court had jurisdiction to entertain the suit though the defendant had signed the note at Secunderabad whence he had sent it by post to the plaintiff.

The making of a promissory note is altogether the act of the maker, and delivery to the promisee is required to render it complete.

1863. February 7, 9. O. S. No. 36 of 1862.

PLAINT for rupees 513-8-0 on a promissory note, dated " Madras, 27th September 1860."

The summons was served upon the defendant at Secunderabad, where he had dwelt at and for some time previously to the filing of the plaint. He did not appear in obedience to the summons, and the case was heard *ex parte* in chambers.

No counsel appeared for the plaintiff.

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The plaintiff proved the defendant's signature to the note; but stated that the note, though dated at Madras, was in fact signed by the defendant at Secunderabad. The body of the note was written in Madras, and it was sent by post to the defendant, who returned it with his signature through the post to the plaintiff at Madras. This note was given in renewal of a former note, which had been signed by the defendant at Madras; and the original consideration was goods supplied to the defendant at Madras.

On the 13th of February 1863 the following judgment was delivered by

BITTLESTON, J.:—The defendant in this case dwells beyond the local limits of this Court's jurisdiction; and upon the summons, which contains his acknowledgment of the service of it, he states his objection to the jurisdiction. The jurisdiction depends upon the question whether the cause of action arose within the local limits. The original consideration appears to have been goods supplied to defendant at Madras, and the first note, of which the one sued upon is a renewal, was signed and delivered by the defendant at Madras. If the note sued upon had been both signed and delivered by the defendant at Madras, I should not have doubted at all as to the jurisdiction; but this note, though dated at Madras, was in fact signed at Secunderabad. Since the last Court-day I have considered the point; and I think that on two grounds this note must still be considered as made at Madras, so that upon its non-payment a cause of action arose there. First because the defendant signed it as a note made at Madras. Secondly because the delivery of the note to the plaintiff took place at Madras; and the delivery to the plaintiff was necessary to complete his title. In *Wilde* v. *Sheridan(a)* Coleridge, J. points out the distinction between an acceptance of a bill of exchange which is written on the drawer's paper and is complete without delivery, and an indorsement which is incomplete without delivery. The making of a promissory note is altogether the act of the maker, and requires delivery to the promisee to render it

(*a*) 21 L. J. Q. B. 260; 1 Bail C. C. 56. See *Buckley* v. *Hann*, 5 Exch. 43 and *Roff* v. *Miller*, 19 L. J. C. P. 278.

1863. February 7, 9. O. S. No. 86 of 1862. complete; and as in this case it was delivered to the plaintiff at Madras, and was dated at Madras, I think this Court has jurisdiction and that the plaintiff is entitled to judgment for the amount claimed.

Judgment for the plaintiff for rupees 513-8-0.

Original Jurisdiction.

Original Suit No. 170 *of* 1855.

COULTRUP and another *against* SMITH.

The judgments of the Judges of the late Supreme Court sitting under Act IX of 1850 (the Small Causes Courts Act) are judgments of a Court established by Royal Charter, and are therefore not affected by Act XIV of 1859, sec. 20.

1863. February 10. O. S. No. 170 of 1855.

AT the sitting of the Court the following judgment was delivered by

SCOTLAND, C. J.:—Yesterday in chambers an application was made to me by Mr. Ritchie, of the firm of Ritchie and Shaw, to set aside a writ of execution issued in a case of *Coultrup and another* v. *Smith* which was tried by the late Supreme Court, sitting under the Small Causes Courts Act (Act IX of 1850). He contended that the matter came within the Limitation Act (Act XIV of 1859), section 20, because, he said, the Judges of the Supreme Court, when sitting under the Small Causes Courts Act, did not constitute a court established by Royal Charter. I took time to consider the point, which seems novel, and is of some importance, and am now prepared to dispose of the application.

Looking to the provisions of the Small Causes Courts Act and the Limitation Act it seems clear that the powers vested in the Judges of the Supreme Court by the former Act were exercised by them as Judges of the Supreme Court. The 11th section of Act IX of 1850 provides that "any judge or judges of the Supreme Court of Judicature who shall consent to aid in the execution of this Act *may* exercise all the powers of a Judge appointed under this Act, and suits *may* be tried by him sitting in the Supreme Court un-

1863. *February* 10. *O. S. No.* 170 *of* 1855.

der this Act in the same manner as if he were a Judge of the Court of Small Causes." And section 12 of the same Act provides that in such cases the ministerial officers of the Supreme Court shall perform the duties prescribed for the clerk and bailiffs of the Court of Small Causes. The effect of all this was simply that the Supreme Court Judges *might* exercise the powers conferred by the Act on the Small Cause Court Judges; but that when they did so they exercised such powers as Judges of the Supreme Court. Then the Limitation Act (XIV of 1859), section 20, provides that "no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order, of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution." It is perfectly clear, first, that this section applies only to the judgments of courts *not* established by Royal Charter—and in the present case the judgment is the judgment of a court which *is* established by Royal Charter—and, secondly, that the words "unless some proceeding shall have been taken to enforce such judgment" refer to the issue of execution from a Court *not* established by Royal Charter. Here the execution has issued from a Court which *is* established by Royal Charter Section 20 of Act XIV of 1859, accordingly, does not apply, and the judgment-creditor, if otherwise entitled to it, has a perfect right to maintain his execution. The application must be refused.

Application refused.

Appellate Jurisdiction (a)

Special Appeal No. 62 *of* 1862.

PERIYA GAUNDAN..........................*Appellant.*

TIRUMALA GAUNDAN and others..........*Respondents.*

A and B sued D and E for the estate of their relative C, the deceased husband of D, on the ground that the family to which A, B and C belonged was undivided. D (who was a Hindú widow without surviving issue) and E pleaded division and that D had sold and assigned the estate to E. This alienation was not shewn to have been made for purposes recognised by Hindú law:—*Held* that the District Munsif, in disallowing the plaintiff's claim to immediate possession, should not have provided for the re-assignment of the estate from E to D for D's life, but that he was right in declaring that after D's death the property should revert to the plaintiffs as heirs of C.

1863. *February* 12. *S. A. No.* 62 *of* 1862.

THIS was a Special Appeal from the decision of J. W. Cherry, the Civil Judge of Salem, in Appeal Suit No. 162 of 1861, affirming the decree of the District Munsif of Námagiripeṭṭai in Original Suit No. 742 of 1859.

Tirumaláchâriyár for the special appellant, the second defendant.

Saḍagópáchárlu for the special respondents, the plaintiffs and first defendant jointly.

The facts of the case sufficiently appear from the following

JUDGMENT:—The plaintiffs sued for recovery of lands, a well, a house, and half a cocoa-nut tree, valued in all at rupees 280-8-0, being the estate of their deceased relative, the husband of the first defendant, on the ground that their family was undivided, and that the first defendant being a widow had no title to possession.

The first defendant pleaded that her late husband had divided off from the plaintiffs and other members of the family; that she had entrusted half of the lands in question to the second defendant, on condition of his paying to her periodically a share of the profits, and that she had sold the other half to the same defendant in the year 1858. The answer of the second defendant himself was to the same effect.

(a) Present Frere and Holloway, J J.

The District Munsif was of opinion that the plaintiffs and the first defendant's late husband were divided members of the same family, but that the alienation of the property was not shewn to have been made for purposes admissible in law, in a case such as that of the first defendant, who is a widow without surviving issue; and that the transfer by sale and otherwise to the second defendant could therefore have no effect after the death of the first defendant. On these grounds the District Munsif decreed that the first defendant should be replaced in possession for the term of her life; and that after her death the property should revert to the plaintiffs, as the heirs at law of the deceased husband of the first defendant. The second defendant appealed from this decision, which was, however, affirmed by the Civil Judge.

1863. *February* 12. *S. A. No.* 62 *of* 1862.

We observe that the District Munsif in this case, in disallowing the plaintiff's claim to immediate possession, provided by his decree for the transfer of the property from the second to the first defendant for the life of the latter. This portion of the decree was manifestly irregular and extrajudicial, and it was the duty of the Civil Judge to have amended the original decree as respects this point. We find no grounds, however, for interfering with the decision of the courts below as regard the reversionary right to which the plaintiffs are declared to be entitled on the death of the first defendant. The sale and transfer from the first to the second defendant were clearly invalid by Hindú law, for the reasons stated by the District Munsif, and can have no effect therefore as against the rights of succession to which the plaintiffs are entitled on the death of the first defendant, as the legal heirs of her deceased husband. We find that this decision is in accordance with that passed in a recent case before the High Court of Bengal, No. 24 of 1859, whichis reported at page 99 of the *Indian Jurist* for December 1862.

We resolve therefore to modify the judgment of the courts below to the extent abovementioned. The costs will be paid by the parties by whom they were respectively incurred throughout the entire case.

Appeal allowed.

Appellate Jurisdiction (a)

Referred Case No. 1 *of* 1863.

VEṄGAPPAIYAN *against* RA'JA'PAIYAN.

When the full sum specified in a bond was admitted to be due, the fact of the plaintiff having on condition of the payment of half the amount by a certain day agreed to remit his claim to the other half, cannot affect his right to recover the entire amount due on the defendant failing to fulfil the condition.

1863. *February* 16. *R. C. No.* 1 *of* 1863.

CASE referred for the decision of the High Court by R. B. Swinton, Judge of the Small Causes Court of Tanjore. The plaintiff sued on a bond dated the 21st Chittarai of Durmati (1st May 1861) to secure rupees 300, which was to be paid on demand in default of payment of rupees 150, part thereof, on the 30th Kárttika of Durmati (13th December 1861). The defendant failed to pay the rupees 150 on the day appointed; and the Judge of the Small Cause Court decreed that the defendant should pay the plaintiff rupees 316 with further interest on rupees 300 at 1 per cent. from the date of the decree, contingent upon the final decision of the High Court.

No counsel were instructed.

The judgment of the Court was delivered by

SCOTLAND, C. J.:—We are of opinion that the Judge has rightly decided this case. It is admitted that the full sum specified in the bond was actually due, and the fact of the plaintiff having, on condition of the payment of half the amount by a certain day, agreed to remit his claim for the other half, cannot affect, in any way, his just right to recover the entire sum due, on the defendant failing to fulfil the condition. There is no ground for saying that any part of the amount agreed to be paid is to be treated as in the nature of a penalty.

(a) Present Scotland, C. J. and Frere, J.

Appellate Jurisdiction (a)

Referred Case No. 2 *of* 1863.

KARUPPAṆṆA NA'YAK *against* NALLAMMA NA'YAK.

Where a bond was given to secure a debt which was to be repaid by seven annual instalments, and the bond provided that upon failure to pay a single instalment the whole principal sum secured should immediately become due and recoverable with interest:—*Held*, that the cause of action in respect of the principal and interest arose on failure to pay the first instalment.

1863. *February* 16. *R. C. No.* 2 *of* 1863.

CASE referred for the decision of the High Court by R. Davidson, the Acting Judge of the Small Causes Court at Madura. The plaintiff sued on a bond of which the following is a translation ;—" Debt-bond executed on the 3rd A'ni of Rachasa (16th June 1855) by Nattamai Nallamma Náyak, son of Rangappa Náyakan, residing in the village of Vḗḍar Puḷiyangulam, to Karuppaṇṇa Náyakan son of Aḷagiri Náyakan, residing in the said village. I sold to you half a karé of land, &c. under stamp kadján deed of sale for rupees 108-12-0 on the 7th A'di of Virṓdikurutu, and received the amount immediately. But as I have no means to pay rupees 52-8-0 to redeem the lands from the previous mortgagee, and as you have paid the amount, and as that sum has been paid to the previous mortgagee, as also for another debt-bond for which you stood security for me, I hereby promise to pay the said sum of rupees 52-8-0 in seven instalments namely, on rupees 7 on the 30th of Panguni next (10th April 1856), rupees 7 on the 30th of Panguni Nala; rupees 7 on the 30th of Panguni of Pingaḷa, rupees 7 on the 30th of Káḷayukti, rupees 7 on the 30th of Panguni of Sittádri, rupees 7 on the 30th of Panguni of Raudri and rupees 10-8-0 on the 30th of Panguni of Durmati, and thus credit such payments on the back of the bond. On failure of a single instalment, if you bring a suit for the amount including the principal and interest at the rate of one per cent per mensem from the date of the bond after deducting any payment made for the principal I shall pay the amount, with costs without defending it. Thus I Nallamma Náyak have executed the debt bond with my free will to Karuppaṇṇa Náyakkan."

(a) Present Scotland, C. J. and Frere, J.

1868. February 16. R. C. No. 2 of 1863.

More than six years elapsed between the time when the first instalment became due and the commencement of the suit No. 1046 of 1862 out of which the present case arose. The defendant's vakíl argued that the law of limitation ran from the 10th of April 1856, the date on which the first instalment was made payable, and that therefore the suit was barred. The Judge, however, held that the law of limitation only ran from the date at which the last instalment was made payable and accordingly decreed for the plaintiff, contingent upon the final decision of the High Court.

No counsel were instructed.

The following judgment was delivered by

SCOTLAND, C. J.:—The bond on which the plaintiff's claim in this case is based, was not of a nature capable of registration under section 3, Regulation XVII of 1802, being a simple bond executed by the defendant to secure a debt, which was to be repaid by seven annual instalments. The enactment therefore in clause 10, section 1, Act No. XIV of 1859, is inapplicable to this bond, and the period of limitation which must be held to govern the case is that contained in clause 16 of the same section. A decision to this effect was recently given in *Referred Case No.* 3 *of* 1862.

But it appears that a period of more than six years was allowed to elapse between the time at which the first instalment became due and the commencement of the suit; and considering the proper construction of the stipulation in the bond, as regards failure in payment of a single instalment, to be, that upon such failure the whole principal sum secured by the bond immediately became due and recoverable with interest, then the plaintiff's cause of action in respect of such principal sum and interest arose at the time of the failure to pay the first instalment, and consequently the limitation Act operated, we think, as a bar at the commencement of the present suit. Allowing a further time for payment after default in payment of the first instalment was quite an optional forbearance and indulgence on the part of the plaintiffs.

NOTE.—See *Hemp* v. *Garland* 4 Q. B. 519. s. c. 12 L. J. Q. B. 134.

Appellate Jurisdiction (a)

Referred Case No. 7 *of* 1863.

RA'MASVA'MI AYYAN *against* APPA'VAIYAN.

When the Court orders further interest under Act XXIII of 1861, sec. 10, it is to be from the date of the decree to the date of payment of the principal sum adjudged, and not for a limited period.

1863. *February* 16. *R. C. No.* 7 *of* 1863.

CASE stated for the decision of the High Court, by R. B. Swinton, Judge of the Small Causes Court at Tanjore. The plaintiff sued on a bond in the following terms :—" Debt-bond executed by Appávaiyan living in Pudukóṭṭai to Kumbakonam Rámasvámi Ayyan living in ditto on the 25th October 1859. Having borrowed this day of you rupees 10 on account of my necessities I will repay the same together with interest at 1 per cent. whenever the demand is made. Thus, I, Appávaiyan executed this debt-bond to Rámasvámi Ayyan. Thus I put my signature as Appávaiyan." The judge made the following decree :—

" Decreed that defendant pay plaintiff rupees 13 13 4 with costs.

Costs	Stamp.........Rs.	1	8	0				
	Peon's batta. „	1	8	0				
	Pleader's fee. „	5	0	0				
		8	0	0		8	0	0
					Total...	21	13	4

with interest thereon at 1 per cent. per month for thirty days from this date, contingent upon the decision of the High Court," as to whether the judge was authorized under section 10 of Act XXIII of 1861 to order interest for a fixed period.

That section enacts that " when the suit is for a sum of money due to the plaintiff, the Court may in the decree order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the

(a) Present Scotland, C. J. and Frere, J.

1863. February 16. R. C. No. 7 of 1863. date of suit; with further interest on the aggregate sum so adjudged and on the costs of the suit from the date of the decree to the date of payment."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The Judge, we think, was in error in decreeing the payment in this case of interest for the limited period of thirty days from the date of the decree. A discretion is given in section 10 of Act XXIII of 1861, as to the granting of further interest after the making of the decree; but when the Court thinks proper to grant such interest, it is to be from the date of the decree to the date of payment. The discretion as regards the time of payment is given in respect of two periods of time—from the date of the suit to the date of the decree, and from the date of the decree to the date of payment; whereas, under the repealed section (193) of Act VIII of 1859, only one period was provided for, namely from the date of suit to date of payment.

Appellate Jurisdiction (a)

Referred Case No. 9 *of* 1863.

SUBBIRAMAṆIYA AYYAN *against* VE'LA'YUDA DE'VAR.

In a suit for arrears of rent a Small Causes Court may decide whether the renting has taken place and pass judgment for the amount claimed, without adjudicating on the plaintiff's title.

1863. February 16. Case No. 9 of 1862. IN this case R. B. Swinton, the Judge of the Small Causes Court of Tanjore, stated for the decision of the High Court a question which had arisen in each of the Suits Nos. 645, 646 and 647 of 1862 on the file of his Court.

The facts sufficiently appear from the following judgment which was delivered by

(a) Present Scotland, C. J. and Frere, J.

1863. February 16. R. C. No. 9 of 1861.

SCOTLAND, C. J.:—In the three cases stated for the decision of the Court the plaintiff claimed to recover from the defendant arrears of rent alleged to be due to him under rent-bonds and a verbal agreement; and we are of opinion that the Judge was wrong in deciding that it was not competent for him to enter into the question of whether the renting relied upon by the plaintiff had taken place. It is clear that in respect of suits for rent Courts of Small Causes have jurisdiction, and in such suits the question of whether or not there has been a renting of the property, when raised as in the present cases, must necessarily be considered and decided. The defendant cannot oust the jurisdiction of the Court by the mere fact that he also denies the title of the plaintiff to the property alleged to have been rented. The denial of title in these cases may be altogether unfounded and fraudulently put forward; and, exercising his jurisdiction as regards the claim of rent, it was for the Judge to hear the evidence and decide with respect to the rent-bonds and agreements, on which the plaintiff's claim was founded. If they were clearly proved to the satisfaction of the Judge —if it was also proved also that an arrear of rent had become due from the defendant to the plaintiff, the Judge was fully competent to pass judgment for the amount of the arrear proved to be due under those rent-bonds and agreements, without going into the question of title to the property rented.

In the case in which the counterpart lease is said to have been lost, it is of course incumbent on the plaintiff to account satisfactorily for the non-production of this document, before he can be allowed to go into secondary evidence to prove its contents.

Appellate Jurisdiction (a)

Regular Appeal No. 28 *of* 1862.

TIRUMAMAGAḶ AMMA'L.........................*Appellant.*
RA'MASVA'MI AYYAṄGA'R and another...*Respondents.*

The mental incapacity which disqualifies a Hindú from inheriting on the ground of idiocy is not necessarily utter mental darkness.

A person of unsound mind, who has been so from birth, is in point of law an idiot.

The reason for disqualifying a Hindú idiot is his unfitness for the ordinary intercourse of life.

1868. *February* 19. *R. A. No.* 28 *of* 1862.

THIS was a regular appeal from the decision of E. W. Bird, the Acting Civil Judge of Negapatam, in Original Suit No. 1 of 1862. The plaintiff, a Hindú widow, sued her deceased husband's brothers for her son's share of the family-estate. The defendants rested their case chiefly on the ground that the son was disqualified by idiocy to inherit. The Civil Judge adopted their view and accordingly dismissed the suit. The plaintiff now appealed against the Civil Judge's decree.

Branson and *Rámanuja Ayyaṅgár* for the appellant, the plaintiff.

Saḍagópáchárlu and *Rájagópáláchárlu* for the respondents, the defendants.

The arguments for the appellant sufficiently appear from the judgment of the Court, which was delivered by

HOLLOWAY, J.:—The Civil Judge decided that the boy on whose behalf the suit was brought was from idiocy not qualified to inherit. Whether this is so or not was the only question argued before us, and is the only one which it is necessary for us to determine.

As to the unsoundness of mind of the unhappy youth, his incapacity for instruction, his inconceivable delusion as to the most common matters, his inability to perform the most common mental operations, there can be no question. That a deed executed by him would be voidable, that his marriage-contract by English law would be invalid(b), no doubt can exist.

(a) Present Strange and Holloway, J. J.

(b) By the Hindú law a marriage is not a contract: it seems therefore that a Hindú idiot's marriage would be valid. See *Dabychurn Mitter* v. *Radachurn Mitter*, 2 Morl. Dig. 99, where a lunatic's marriage was held valid.

It has, however, been contended that to justify disqualification on the ground of idiocy, there must not be the slightest glimmering of reason, that this is the strict legal definition of idiocy by the law of England, and that by which we must be bound. It would perhaps be very difficult to contend that in this case, the reasoning faculty can strictly be said to exist. There are perceptions, but the power of arranging or combining them, seems scarcely to exist.

We are however clearly of opinion that the mental incapacity which is to disqualify on the ground of idiocy, is not the utter mental darkness for which the appellant's counsel has contended.

Lord Coke (Co. Lit. 247a) classes idiots as one of the species of "non compotes mentis" distinguished from lunatics by the circumstance that the idiot is he "which from his nativitie, by a perpetual infirmitie, is non compos mentis." If then this great authority stood alone, the question by the law of England would be, first, was this child "non compos mentis"—and, secondly, was he so from his birth? No jury could hesitate to answer both of these questions in the affirmative. It is not however to be denied that the language of Blackstone (vol. I p. 304) is much more unqualified "a man is not an idiot if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters." On such common matters we incline to think that this boy is incapable.

The counsel for the appellant referred us to a case in Bligh, which we presume to be *Ball* v. *Mannin(a)*, and which is much better reported in 1 Dow and Clark 380. This case appears to us to show most clearly that if a person is of unsound mind and has been so from his birth, he is as to all legal disabilities and incapacities in the position of an idiot. The question was whether a deed executed by Ball deceased was void on the ground of incapacity, and it was conceded that there was no evidence whatever of insanity. The Judge left the question of incapacity to the jury, and a bill of exceptions was brought because the judge refused to tell the jury that the deed would not be void if there was any

(a) 3 Bligh N. S. 1.

1863. February 19. R. A. No. 28 of 1862.

glimmering of reason. Lord Tenterden in delivering the judgment of the House of Lords upheld the Judge's direction, and at page 392 said. "The strict legal definition of an idiot in an old book which I have brought is that if a man can repeat the letters of the alphabet, or read what is set before him, he cannot be taken to be an idiot, but you would say that this was contrary to common sense, for as to repeating the letters of the alphabet or reading what is set before him, a child of three years old can do that. Then the question is whether the party was of sound mind or not." The authority of this very eminent judge appears to be in favour of the old definition of Coke, for, seeing that there was no evidence of insanity, that the case was put upon the ground of idiocy, the direction could not be right if the definition of Blackstone is in truth correct. The case is at any rate a clear authority for the position that weakness of mind far short of that described will disable from contracting.

It will be found that the doctrine of Hindú law, by which on this question we are to be bound, is very similar. "An idiot" "a person deprived of the internal faculty: meaning one incapable of discriminating right from wrong" (Mitákshará chap. II, section X, par. 2), and a more expanded definition in W. H. Macnaghten's *Principles and Precedents of Hindú Law(a)*: Idiot—"a person not susceptible of instruction:" "One who cannot support the performance of duties(b)." "Devoid of knowledge of himself, and one whose intellectual faculties are imbecile(c)." These authorities seem clearly to show that the question in Hindú law is precisely the same as would be derived from Coke's definition and from the case of *Ball* v. *Mannin*. The reason of the rule is no doubt, as Sir T. Strange states it *(d)*, the unfitness of persons so situated for the ordinary intercourse of life.

We are deeply sensible of the mischief which would result from any attempt to interfere with the disposition or enjoyment of property merely on account of eccentricity of conduct. The imprudent, the unthrifty, the profligate entail misery upon themselves and others, but they are not on that

(a) Vol. II, p. 135, Class 4, citing Jímútaváhana.
(b) Ibid. citing Raghunandana.
(c) Ibid. citing Chandeçvara.
(d) 1 Strange's *Hindú Law*, 152.

account to be treated as insane. We are fully satisfied that an idiot in Hindú law is one of unsound and imbecile mind who has been so from his birth. The question of unsoundness and imbecility is to be determined not upon wire-drawn speculations but upon tangible and unmistakeable facts: and being clearly of opinion that there are such facts in this case, that this unhappy youth is congenitally imbecile, and therefore incapable of inheriting—we dismiss this appeal with costs.

1863. *February* 19. *R. A. No.* 28 *of* 1862.

Appeal dismissed.

Insolvent Jurisdiction (*a*)

In the Matter of THOMAS PEREIRA, an Insolvent.

Under a vesting-order an insolvent's estate became vested in the Official Assignee who paid the scheduled creditors the principal of their debts. A discharging-order was then made under sec. 59 of the Indian Insolvent Debtors' Act (11 Vict. c. 21). At the date of such order the Official Assignee had rupees 143-1-8 to the credit of the insolvent's estate. He subsequently received the interest on certain securities which had been bequeathed to the insolvent for his life before the date of the vesting-order.

Held:—That the discharging-order did not make the vesting-order void; nor as regarded the estate vested in the Official Assignee did it revest immediately the right of property in the insolvent:

That creditors are entitled to interest on interest-carrying debts out of a surplus remaining in the Official Assignee's hands after payment of the scheduled amount of debts:

That notwithstanding the discharging-order the Court might direct the rupees 143-1-8 and the interest subsequently received to be paid to the insolvent's creditors rateably in respect of interest on their debts calculated down to the date of the discharging-order and that the balance should be paid to the insolvent or his representative;

That the interest subsequently received by the Official Assignee was "neither after-acquired property" within the meaning of sec. 59, nor "a debt growing due to the insolvent before the Court shall have made "its order" within the meaning of sec. 7 of 11 Vict. c. 21.

Re Alexander McClean concurred in.

IN this case the following judgment, from which the facts sufficiently appear, was delivered by

1863. *February* 20.

SCOTLAND, C. J.:—This case comes before the Court on two distinct applications: one by two of the insolvent's creditors, claiming to have interest allowed them upon their debts, and the other on behalf of the insolvent, since deceased, for an order directing the Official Assignee to pay over the sum in his hands of rupees 379-4-8. The material facts are these. The insolvent's estate became vested in the Official Assignee under an adjudication and vesting order

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made on the 17th July 1857. Between that time and the 30th November 1861, when the last dividend was paid, the principal sum of the debts due, as well to the two creditors now applying to the Court, as to all the other scheduled creditors, was fully paid off out of the estate that had come to the hands of the Official Assignee. On the 14th December 1861, the insolvent petitioned for and obtained under section 59 of the Insolvent Debtors' Act, an order *nisi* in the nature of a certificate for the discharge of his person and property from the demands of his creditors. The order so obtained specified all the creditors, and notice of it was duly given to them. On the 31st January 1862, the Court, after hearing one of the creditors now applying, (no other creditor appearing to show cause againt the order *nisi*) made an order directing that the insolvent be for ever discharged not only personally, but also in respect to all property to be by him thereafter acquired, from all liabilities whatever in respect of the debts mentioned in his schedule, and, particularly from all demands or claims by or on account of the creditors personally named in the said schedule. When this order was made there was in the hands of the Official Assignee to the credit of this estate rupees 143-1-8, and subsequent to the making of the order the Official Assignee received from the Accountant General (as he had as Official Assignee before done with the sanction of the Court on the Equity side of the late Supreme Court,) the half-yearly amount of interest which had subsequently become due in respect of certain government securities, the interest upon which the insolvent was, under a bequest in a will, entitled to receive for his life. After the granting of the order under section 59 of the Insolvent Act, an order on the Equity side of the Supreme Court was made, rescinding the former order under which the Official Assignee had received the interest to which by the bequest in the will the insolvent was entitled, and since that time also the death of the insolvent has taken place.

The question now is, what is the legal effect of the order made under section 59 of the Insolvent Act as regards the claim of the creditors applying for the payment of interest upon their debts out of the sum of rupees 379-4-8 in the Official Assignee's hands, made up in part of the amount

received by the Official Assignee for interest due since the making of the last mentioned Order? 1863. *February* 20.

There is clearly no ground, I think, for saying that it rendered the vesting order void; nor do I think that as regards the estate vested in the Official Assignee it would have the effect *per se* of revesting immediately the right of property in the insolvent: see sections 9 and 11 of the Act and *Kernot* v. *Pittis*(a). Here the point for decision depends upon the question of whether or not the operation of the vesting order was put an end to by the order made under section 59 so far as concerned the claims of creditors through the Official Assignee to the interest subsequently accruing due to the Insolvent. As regards the balance in the hands of the Official Assignee when the order under section 59 was made, there can be no doubt that the Court may, notwithstanding such order, direct that amount to be paid to creditors in respect of interest. It can make no difference in the construction of section 59 that the claims of creditors have not been fully satisfied; and in this case it was in the discretion of the Court under that section to have refused the order, or to have made a qualified order providing in terms for further payments to the creditors in respect of interest. The order, however, is general, and if the interest subsequently accruing due to the insolvent, cannot be considered as *after-acquired property* within the meaning of the 59th section, then the operation of the vesting-order was, I think, still left in force as to it, and the Court may in its discretion now make an order for the appropriation of the whole amount in the Official Assignee's hands to the payment of interest due to the creditors. Then, was the interest subsequently accruing due after-acquired property within the meaning of the 59th section? I am of opinion that it cannot be so considered. By the operation of the vesting-order the life interest of the insolvent passed to the Official Assignee for the benefit of the creditors coming in under the insolvency-proceedings, subject, of course, to the necessary sanction of the late Supreme Court on its equity side, and the force of the vesting-order was not got rid of by the order made in this case under section 59. The

(a) 23 L. J. Q. B. 33.

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words in section 7 of the Act providing that the operation of the vesting-order shall extend to (amongst other property of the insolvent) " all debts growing due to him *before* the Court shall have made its order in the nature of a certificate," when taken with the other words of the section, do not, I think, apply to the interest-monies accruing due under the bequest to the insolvent in this case. Upon the making of the vesting-order the insolvent's life-estate or interest under the bequest passed to the Official Assignee, and had the effect of immediately transferring to him the right to all future as well as present accruing interest. The right to receive the future accruing interest was at the time of the vesting-order a fully acquired right in the insolvent, and all his right passed to the Official Assignee. The sum then in the hands of the Official Assignee is, I think, unaffected by the order made under section 59, and the remaining question is whether payment of interest upon the scheduled debts should be granted? As to the right of creditors to interest on such debts as legally carry interest it is unnecessary to do more here than refer to the case of *In Re Alexander Maclean* in this Court, in which judgment was given on the 10th April 1861. In that case, after a full review of all the cases on the subject, my Brother Bittleston decided that creditors were entitled to an order for payment of interest upon such debts as legally carried interest out of a surplus remaining in the Official Assignee's hands after payment off of the scheduled amount of the debts, and in that decision I concur. My judgment therefore is that the sum in the hands of the Official Assignee's hands should be applied towards the payment of interest upon such of the scheduled debts as bear interest calculated down to the date of the making of the order under section 59, and that the present applicants are entitled to a dividend out of the amount rateably with the other creditors (if any) whose debts bear interest, and that any balance remaining over should be paid to the legal representative of the insolvent.

NOTE.—The following is the judgment in *In Re Alexander MacClean's Estate* referred to by the Chief Justice:

1861. April 10.

BITTLESTON, J.:—It appears that in this estate all the creditors have received twenty shillings in the pound upon their scheduled debts, and that there remains in the hands of the Official Assignee a considerable sum, with regard to which the question is, whether I ought to direct it to

be paid over to the insolvent, or to be applied by the Official Assignee in payment of interest to the creditors? 1861. *April* 10.

I am of opinion that it should be applied in payment of interest upon such debts as by contract, express or implied, bear interest.

Ever since the year 1743 it has been well established in bankruptcy that if the estate is more than sufficient to pay the creditors twenty shillings in the pound, the surplus is to be applied to the payment of interest on debts bearing interest by contract.

I refer to the cases of *Branley* v. *Goodere,* 1 Atk. 90; *Ex parte Morris,* 1 Ves. Jr. 132; *Ex parte Mills,* 2 Ves. 295; *Ex parte Reeve,* 9 Ves. 583, 590; *Ex parte Hill,* 11 Ves. 654; *Butcher* v. *Churchill,* 14 Ves. 567, 573, and *Bower* v. *Morris,* Cr. & Ph. 351, 356. These cases (excepting the last) were determined at a time when the bankruptcy-acts were entirely silent as to the allowance of interest subsequent to the date of the commission: for the first statutory provision on that subject was contained in the 6 Geo. 4, c. 16, section 132, and that statute received the Royal Assent on the 2nd May 1825.

I have referred to them all, and they seem to me to proceed substantially upon these considerations:—that the bankruptcy-acts were passed for the benefit of creditors as much as for the benefit of bankrupts: that, whenever the bankrupt's estate in the hands of the Assignee proves sufficient for the purpose, justice to the creditors requires that their debts (including interest subsequent to the date of the commission upon debts by contract bearing interest) should be fully satisfied before any surplus is returned to the bankrupt: that the earlier statutes expressly left open to the creditors who had not been fully satisfied, all their remedies against the bankrupt and his future effects; and that though the subsequent statutes made the certificate a bar, the future estate only was protected by the certificate: that there was no express provision depriving the creditors of their right to full satisfaction out of the estate to be administered, that estate being sufficient for the purpose; and that for such an effect express enactment was necessary.

In 1825 the rule established by these decisions was adopted and extended by the legislature, and the provision introduced (6 Geo. 4, chap. 132) prohibiting payment of any surplus to the bankrupt until not only the creditors (whose debts carry interest) have received interest on their debts, but also until all other creditors have received interest at 4 per cent. The same provision is contained in the present Bankruptcy Act, 12 and 13 Vict. c. 106, s. 197(*a*).

So far as to the English Bankruptcy Acts. But it has been supposed that the law in England under the Insolvent Debtors' acts is materially different. I refer particularly to the opinion of Mr. Commissioner Law in Mr. Joy's case (20 L. T. 263).

The insolvent debtors' acts, as well as the bankruptcy-acts, are framed principally with reference to the case of a deficiency of assets; and are designed to bring about an equitable adjustment of the rights of debtors and creditors in that state of things.

But (excepting one clause to which I will immediately refer) I do not see in the acts for the relief of insolvent debtors, more than in the bankruptcy-acts, any indication of an intention to deprive the creditors of any portion of their legal demands which the available estate of the debtor may be sufficient to meet.

Indeed, as regards after-acquired property, the insolvent acts are more favourable to the creditor than the bankruptcy-acts; for it has always been imposed as a condition of relief under those acts that, subject to the discretion and under the order of the Court, that property should be available for the payment of the creditors, against whom the relief is given.

However in the earliest general insolvent act,—53 Geo. 3, c. 102 (passed 10th July 1813)—there is a section (22) which provides that from the order of discharge all *interest* shall cease, and prohibits the computation, unless the court shall be satisfied not only of the sufficiency of the present and future estate to pay the principal of the debts payable under

(*a*) This section is not repealed by the Bankruptcy Consolidation Act, 1861. See, besides the cases cited by Bittleston, J., *Ex parte Wood,* 2 M. D, & D. 283: *Ex parte Houston,* 2 G. & J. 36: *Ex parte Higginbotham,* Ibid. 123: *Ex parte Minchin,* Ibid. 287: *Ex parte Bix,* Mont. 237.

1861. *April* 10.

the act, as well as all other debts, and to afford the prisoner competent means of future subsistence, but also that the estate is so considerable as to render it fit that interest should be allowed.

Of course if that enactment had been repeated in the subsequent insolvent acts, the question as to allowance or disallowance of interest would have been one of mere discretion, and its decision must have depended upon the particular circumstances of each case: but in fact that was not re-enacted. It does not appear in 1 Geo. 4, c. 119 (26th July 1820), nor in any subsequent insolvent act.

Since 1820, therefore, there has been no express provision that interest should cease from the date of the order of discharge, nor that the court should exercise a discretionary power, in case of a surplus, of allowing or refusing interest according to the extent of the surplus, and the circumstances of the particular case. But I cannot infer from this circumstance that it was the intention of the legislature that in no case should interest be allowed, subsequent to the discharge of the insolvent.

The estate of the insolvent vested in the Assignee is so vested for the benefit of the creditors. It is a fund belonging to the creditors and if that fund is sufficient to pay the creditors not only the principal of their debts, but interest thereon subsequent to the discharge, it seems to me that, in the absence of any statutory enactment to the contrary, it ought to be so applied.

The reasoning upon which the rule in bankruptcy was established seems to me not less applicable to the case of an insolvent debtor.

Mr. Commissioner Law, in the judgment to which I have alluded, recognized the justice of allowing interest to the creditors out of a surplus, and he considered that under the statute 1 and 2 Vic. c. 110, s. 17, interest at 4 per cent. was to be calculated upon the judgment entered up when the insolvent was discharged, for the purpose of affecting after-acquired property. But his opinion certainly was against the allowance of interest subsequent to the insolvency in any other way.

On the other hand the late Chief Justice of this Court, Sir Christopher Rawlinson, in June 1858, clearly expressed a contrary opinion in *Col. Byng's Case*, and I certainly concur with him as to the effect of the English statutes and decisions.

The Indian Insolvent Debtors' Act, 11 Vict. c. 21, provides for cases of bankruptcy as well as insolvency; and contains provisions borrowed from the English Acts relating to both subjects.

It provides in certain cases for a discharge in the nature of a certificate, but it also authorises the Court, before granting such discharge, to require that judgment should be entered up for the amount of debts in the schedule, and in its discretion to direct execution to issue thereon against future estate.

It contains, however, no provision similar to the 22nd section of 53 Geo. 3, cap. 102. The only section relating to the allowance of interest to creditors out of the estate is section 32, which authorises the Court to defer the sale of property of which an immediate sale would be prejudicial to the insolvent and his creditors, and to direct in what manner such property shall be managed for the benefit of the creditors, &c. "*upon such terms and conditions with respect to the allowance of interest on debts not bearing interest or other circumstances as to such Court shall seem just*"—language from which it is not unreasonable to infer that it was deemed unnecessary to make any provision respecting the allowance of interest on debts bearing interest, and which at least affords no foundation for the argument that creditors whose debts carry interest cannot have it after the date of the insolvency, even though the estate be sufficient for the purpose. And this section, in nearly the same words, has been repeated in all the Insolvent Acts, commencing with 53 Geo. 3, cap. 102, of which it is the 12th section.

The 40th section of 11th Vict. cap. 21 was in the course of the argument referred to as though it incorporated the 132d section of 6 Geo. 4, c. 16: but I do not think that it has that effect. It renders all debts and claims proveable under the Bankrupt Acts, also proveable under this Act, subject to the conditions prescribed by those Acts; but the 132d section does not relate to the proof of debts.

With respect to the particular debts upon which interest ought to be calculated it will be probably enough for me to say that in my opinion, following the judgments of Lord Eldon and Sir John Leach in *Ex parte Boyd*(a), interest can only be allowed upon such debts as bear interest by the contract of the parties either express or implied; not upon judgments or any other debts with respect to which interest could only be recovered quâ damages : see also *Ex parte Cocks*(b), *Ex parte Mills*(c), *Ex parte Williams*(d). 1861. *April* 10.

I ought to mention the case of *William Marshall*, which occurred in this Court in May 1841, when Sir Robert Comyn appears to have made an order after notice to the creditors that Mr. Blunt (who was both common assignee and also executor under William Marshall's will) should as common assignee transfer to himself as executor the residue of the estate.

That case (as also the case of Col. Byng) came under the 9 Geo. 4, c. 73, the provisions of which were not materially different, so far as this question is concerned, from those of the present Act, except, perhaps, that it was less favourable to creditors in not containing the provision authorising a judgment to be entered up so as to affect after-acquired property. But I do not find that on that occasion there was any opposition on the part of the creditors to the motion made by the common assignee, who happened to represent both the creditors and the insolvent, nor any argument upon the question which has been raised and argued in this present case.

(a) 1 Glyn & J. 285.
(b) 1 Rose 317.
(c) 2 Ves 302.
(d) Ibid. 399.

Appellate Jurisdiction (a)

Special Appeal No. 736 *of* 1862.

PERAMMA'Ḷ..........................*Appellant.*

VENKAṬAMMA'Ḷ..................*Respondent.*

A Hindú widow, whether childless or not, stands next in the order of succession on failure of male issue.

Daughters can only succeed on failure of widows.

Where A had two wives, B and C, and B predeceased A, leaving three daughters, and C survived A and was childless :—*Held*, that C succeeded to A's property in preference to the three daughters.

THIS was a special appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Appeal Suit No. 60 of 1861, affirming the decree of J. D. Goldingham, Acting Subordinate Judge of Madura, in Original Suit No. 6 of 1859. In this suit the plaintiff claimed the whole of the immoveable and a moiety of the moveable property belonging to Veṅkaṭasvámi Náyak, the father of his three minor grandchildren. Veṅkaṭasvámi had two wives, one of whom predeceased him, leaving the three minor daughters : the other survived him, a childless widow, and was the first defendant in the suit. The question was whether under the circum- 1863. *February* 21. *S. A. No.* 736 *of* 1862.

(a) Present Strange and Holloway, J J.

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stances the minors were or the widow was entitled to take. The Subordinate Judge decided in favour of the daughters, and on appeal the Civil Judge affirmed his decree in the following judgment:—

"The court has given the case its best consideration, and after consulting Macnaghten and Strange on the law-point at issue, sees no cause for questioning the correctness and justice of the lower court's decision. The only point *pleaded in appeal,* calling for consideration, is, whether the fact of the minors' mother having died prior to her husband, affects the minors' claim : but this, the court is of opinion, it does not. Appellant (1st defendant) as a childless widow, cannot by Hindú law *inherit.* She is only entitled to maintenance, or a moiety of her husband's moveable property. Daughters *do inherit* and take by representation according to their mothers (Strange 324: Ṣadr 'Adálat paṇdits, 3rd July 1854*(a)*). The court therefore confirms the lower court's decree—the appellant paying all costs in this appeal."

Branson (*Saḍagópácharlu* and *Rájagópácharlu* with him) for the special appellant, the first defendant. The minor daughters can only claim through their mother, and the estate never vested in her as she predeceased her husband.

Mayne for the special respondent, the plaintiff.

The Court did not call for a reply, and the following judgment was delivered by

STRANGE, J.:—The plaintiff has brought this suit on behalf of three minor daughters of one Veṅkaṭasvámi Náyak. She is their grandmother and guardian, and she seeks to recover for them their father's estate.

The Acting Subordinate Judge has decreed in the plaintiff's favour and the Civil Judge has affirmed his decision.

We are unable to concur in the view taken by the lower Courts of the Hindú law of descent regulating the transmission of the property in dispute. We are not called upon to

(a) The passage in Strange's *Manual of Hindú Law* here referred to is as follows:—" If succession be derived from the mothers, where the father may have had a plurality of wives, the daughters take by representation according to their mothers." The meaning of this seems to be that the daughters in such case take *per stirpes* and not *per capita.*

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decide between the relative rights of the two wives of Veṅkaṭasvámi Náyak, namely, the mother of the minors in whose behalf the suit has been brought and the first defendant, the one as having borne children and the other as childless. Nor have we to say whether or not any such rights transmitted by their mother to the said minors would prevail against the first defendant. For the fact that the minors' mother died before her husband Veṅkaṭasvámi Náyak shows that the estate never vested in her, and consequently could not be transmitted through her. The minors have thus no rights derivable from their mother. Whatever rights they may possess must be traceable from their father Veṅkaṭasvámi Náyak. Now it is indubitable that a widow, whether childless or not, stands next in the order of succession on failure of male issue, and that daughters can only succeed on failure of widows. The law being thus, the minor daughters of Veṅkaṭasvámi Náyak, can have no right to the estate during the lifetime of his widow the first defendant.

We therefore reverse the decrees below and dismiss the suit with costs.

Appeal allowed.

NOTE.—The law is the same in Bengal "If a wife shall die in the lifetime of her husband A, she (the deceased wife) having left a daughter B, if A the father of B shall then die, leaving a childless widow C and his daughter B surviving him,—C shall first take the estate and upon her death it shall go to B." Sir F. W. Macnaghten, *Considerations on the Hindú Law*, p. 9. See too *Ruvee Bhudr Sheo Bhudr* v. *Roopshunker Shunkerjee*, 2 Borr. 656, 1 Morl. Dig. 313: *Vyavahára Mayúkha*, chap. IV, sec. VIII, §§ 3, 10, 11, 12: *Mitákshará*, chap. II, sec. I, § 6, sec. II §§ 1—4.

Appellate Jurisdiction (a)

Regular Appeal No. 16 *of* 1862.

CHINNAIYA NA'TTA'N.........................*Appellant.*
MUTTUSVA'MI PILLAI.........................*Respondent.*

An agreement on a 24-rupees-stamp paper between A, who had obtained from Government the ábkárí farm of a certain ta'aluk, and B, stipulating that, in consideration of rupees 2,000 advanced by B for payment of deposit, the whole management should reside in B, that the parties should each have a half-share and be respectively entitled and liable to profit and loss in respect of his share; that they should account with one another for the sums laid out by B and should settle annually the accounts of profit and loss upon the half share :—*Held*, to be a partnership agreement and to be sufficiently stamped under Act XXXVI of 1860, clause 20, Schedule A.

In determining the stamp to be affixed to a document, the state of things at its execution is alone to be regarded.

1863. *February* 23. *R. A. No.* 16 *of* 1862.

THIS was a regular appeal from the decision of E. W. Bird, the Acting Civil Judge of Negapatam, in Original Suit, No. of which was brought for damages for the breach of an agreement in Tamil dated the 8th of June 1861. The defendant had obtained from the Sarkár the ábkárí rent in the ta'aluk of Chíyáli, for five years from faslí 1271 (1861), and in consideration of rupees 2,000, transferred one-half share thereof to the plaintiff. At the same time he executed the agreement in question of which the following is a translation.

" On the 8th June 1861 this agreement has been granted to Chinnaiya Náttán son of Purayár Chinnatambi Náttán residing in Chekkáchi by Muttusvámi Pillai residing in Arasúr of the said ta'aluk.

" I have rented the ábkárí farm for five faslis from 1st July of 1271 [1861] fasli up to the 30th June of the fasli 1275 [1866], and I have reserved half (share) for myself and have given you the other half and received from you the sum of 2,000 rupees. As I have received this sum of two thousand rupees for the purpose of depositing the same, and have given you half a share in this contract, you yourself shall enjoy the profits and loss appertaining to your half share. You yourself and not I, shall have right to obtain muchalkás during these five faslis respecting that contract for toddy and arrack shops; to employ servants; to manage all the

(a) Present Scotland, C. J. and Holloway, J.

affairs connected with the contract, to incur all the expenses thereof; to cancel bazar (contracts) and to dismiss servants, &c., and to make other arrangements respecting my half share as well as your own half. If I take others as joint partners for my half share I shall be responsible for them, they shall not interfere with your management of the business of the whole of the contract, and you need not be answerable to them. If you receive money and pay every month to the sarkár, I shall admit the same as per account. I shall pay for my moiety whatever amount may be asked for. The amount of expenses that may be incurred by you during these five faṣlis shall be deducted and the accounts respecting the remaining profits and losses shall be examined by me on the 30th June of every faṣli.

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To this end, I, Muttusvámi Piḷḷai have granted this agreement to Chinnaiya Náṭṭán.

(Signed) Muttusvámi Piḷḷai's signature.

I, Puttúr Pachéperumál Náṭṭán of the said ta'aluk, know."

The above document was on a 24-rupees-stamp paper.

The Civil Judge, considering that the contract required an optional stamp, that the plaintiff was therefore under section 14 of Act XXXVI of 1860(a) entitled to sue for rupees 3,000 only, and that the suit was accordingly within the jurisdiction of the Principal Ṣadr Amín, rejected the plaint.

Mayne (with him *Raṅgaiya Náyuḍu*) for the appellant the plaintiff. First, the Civil Judge was wrong in law in holding that the contract sued on required an optional stamp. Secondly, he was wrong in law in holding that the contract was insufficiently stamped, since it was either a deed of partnership, or a sale of a share in a contract, and in either point of view was sufficiently stamped.

(a) This section enacts that "no larger sum shall be recoverable in any Court of Justice by reason of any deed, instrument or writing for which an optional stamp is indicated to be proper by the said schedule than the largest sum for which, if specially stated in a deed, instrument or writing of the same denomination, the stamp actually used under the option so given, would be of sufficient value. And no such deed, instrument or writing shall be held by any Court of Justice to be valid in respect to any sum of money larger than that for which the stamp on the said deed, instrument or writing would be sufficient."

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Branson, for the respondent, the defendant. First, the agreement is neither a deed of partnership nor a contract for the sale of a share in a contract. If it were either it would contravene the policy of Regulation I of 1820 (" A Regulation for rescinding Regulation I of 1808 and for prescribing the rules under which arrack, toddy, and other spirituous and fermented liquors shall be manufactured and sold within the territories subject to the Presidency of Fort St. George, without the limits of the jurisdiction of the Supreme Court of Madras.") Secondly, the Civil Judge was right in treating the agreement as requiring an optional stamp.

Mayne replied.

The Court delivered the following

JUDGMENT:—The plaintiff sued for damages for a breach of contract.

The Civil Judge rejected the plaint because he considered the contract subject to an optional stamp; and the plaintiff therefore, under section 14 of Act XXXVI of 1860, being entitled to sue for rupees 3,000 only, the suit was properly within the jurisdiction of the Principal Ṣadr Amín.

In determining the stamp to be affixed to a document, the state of things at its execution has alone to be regarded.

For the plaintiff it has been argued that the deed is either a deed of partnership, or an agreement for the sale of a share of a contract; and in either point of view was sufficiently stamped. For the defendant it was contended that it could not be considered as a deed of partnership, nor an agreement for the sale of a share of a contract; that a deed for either of these purposes, would be contrary to the policy of Regulation I of 1820, and that it was properly dealt with as a document bearing an optional stamp.

The document was executed by the defendant, who had obtained from Government the ábkárí farm of the ta'aluḳ of Chíyáli. It stipulates that, in consideration of rupees 2,000 advanced by the plaintiff for payment of deposit, the whole management should reside in the plaintiff; that the parties should each have a half share, and be respectively entitled and liable to profit and loss in respect of his share; that they should account with one another for the sums laid out by

the plaintiff, and should settle annually the accounts of profit and loss upon the half share. The document does not purport to transfer to the plaintiff a separate and distinct property in either shops or trees; but provides that the shares shall remain undivided under the plaintiff's sole management, subject to an account by which the profit and loss of the half share is to be ascertained. In terms it seems to us to provide for a partnership between the parties in respect of the subject-matter of the whole undivided contract, each sharing the profit and loss in equal proportions; and we are of opinion therefore that the document in question is a deed of partnership, and is sufficiently stamped under Clause 20, Schedule A of Act XXXVI of 1860.

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We do not consider that the Court can now properly decide whether the agreement is contrary to the policy of Regulation I of 1820. This is an objection, which, if thought tenable, the parties may make at the hearing. The single question before us is, the correctness or incorrectness of the course taken by the Civil Judge in refusing to allow the case to be heard at all.

We reverse the decision of the Civil Judge; direct him to readmit the suit upon his file, and decide it upon the merits; and order that the costs of the present appeal be costs in the cause.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 55 *of* 1862.

RAGAVENDRA RAU.................................*Appellant.*
MUHAMMAD KANITARAGANAR and others......*Respondents.*

Regulation V of 1822 does not apply to disputes respecting irrigation.

The disputes mentioned in section 18 of Regulation V of 1822 are subjected to the procedure provided by Regulation XII of 1816.

1863. *February* 23. *S. A. No.* 55 *of* 1862.

THIS was a special appeal from the decision of J. H. Goldie, the Civil Judge of Tinnevelly, in Appeal Suit No. 367 of 1861. The original suit was brought before the Acting Sub-Collector for the recovery of rupees 213, the value of 35½ kóṭṭais of paddy, which was the loss alleged to be sustained by the plaintiffs owing to the defendants having encroached on the channel irrigating their nañjey lands in the village of Laṭchminarasingapuram, by raising a mud dam across it, and having diverted the water from such channel to the defendant's own fields in the village of Tiruváḍi. The Acting Sub-Collector under Reg. V of 1822 dismissed the plaintiff's claim for damages, but decreed that the defendants were not entitled to use the water in the channel for their lands in Tiruváḍi. On appeal the Civil Judge reversed the decree on the ground that the Sub-Collector should have disposed of the suit under Reg. XII of 1816, the provisions of section 4 of which regulation having (the Civil Judge held) been extended by section 18 of Reg. V of 1822 to all disputes respecting the irrigation of lands.

Regulation XII of 1816, section 4 enacts that

"First. In cases of claims to lands or crops, in districts permanently settled or otherwise, the validity of which claims may depend on the determination of an uncertain and disputed boundary or land-mark, and also in cases of disputes respecting the occupying, cultivating and irrigating of land which may arise between the proprietors, or renters and their ryots, in those districts only where the land revenue

(a) Present Scotland, C. J. and Holloway, J.

is fixed; either permanently or for a term of years, persons having such claims may prefer them in person or by vakíl, to the Collector of the zila' in which the lands may be situated.

"Second. The plaint, if for land, shall contain as accurate a description as can be obtained of the land claimed, its position, boundaries, extent and the value of its estimated annual produce; also whether it be subject to the payment of rent or revenue, or whether it be exempt from any charge on these accounts; also the time when the cause of action arose, the name and residence of the person or persons complained against, and all material circumstances which may elucidate the transaction.

"Third. If the plaint be for water, it shall, with regard to the land to be watered, state the above particulars, and in addition thereto the custom of the village relative to the irrigation of the land in question."

The preamble to Regulation V of 1822 is as follows:—

"Whereas the provisions of Regulations XXVIII and XXX of 1802, have been found insufficient for the due protection of the ryots, inasmuch as the powers they vest in land-holders are prompt and summary, while efficient redress for the abuse of those powers must frequently be sought by the institution of a regular suit, to the expense of which the means of ryots in general are inadequate; and it has been deemed expedient to vest Collectors with authority to take primary cognizance of all cases which, under the provisions of those Regulations, are cognizable by summary suit in the Courts of 'Adálat, provided the officers of Government are not parties in the case, and to authorize the said Collectors to enforce in the first instance the penalties prescribed by those Regulations, their decisions being subject to revision by the Civil Courts when parties may choose to have recourse thereto; and whereas the provisions of Regulation XXXII of 1802 do not afford a remedy sufficiently prompt in cases of sudden and violent disputes respecting the occupancy, cultivation or irrigation of land; and it is expedient to rescind that Regulation, and to refer to the Collectors of the revenue the summary enquiries which, under it, were conducted by the 'adálat of the zila'; and whereas disputes

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as well regarding arrears of rents and rates of assessment, as regarding the occupany and cultivation of land, may occasionally be adjusted by pañcháyats, to the relief of the ryots and the furtherance of the ends of justice; and it is deemed proper to enable Collectors with the consent of the parties, to refer all such cases to pañcháyats for decision, and to extend the provisions of Regulation XII of 1816: The Honourable the Governor in Council has therefore enacted the following rules, to be in force from the date of their promulgation."

And section 18 of the same Regulation enacts that

"The provisions of section 4, Regulation XII of 1816, shall be extended to all disputes between ryot and ryot respecting the occupying, cultivating and irrigating of lands in districts whether permanently settled or otherwise."

The first plaintiff now specially appealed against the Civil Judge's decree.

Norton (*Tirumaláchámiyár* with him) for the special appellant the first plaintiff. The language of the preamble to Reg. V of 1822 is sufficiently general to bring this case within its provisions and it gave the Sub-Collector power to proceed under those provisions and decide the case. The Civil Judge therefore was wrong in holding that the Sub-Collector should have disposed of the suit under Reg. XII of 1816.

The defendants did not appear.

The Court delivered the following

JUDGMENT:—This was a suit for damages for the obstruction of an irrigating channel by which the water was diverted from the plaintiff's land.

The Sub-Collector proceeded according to the provisions of Regulation V of 1822, and decided in favour of the plaintiffs.

The Civil Judge, upon appeal, being of opinion that Regulation V of 1822 was inapplicable to cases of this description, reversed the order of the Sub-Collector.

Mr. Norton, for the appellant, submitted that the very general language of the preamble to Regulation V of 1822

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brought this case within its provisions, and that it gave the Sub-Collector jurisdiction to proceed under its provisions and decide the case, and that the decree of the Civil Judge was therefore wrong. We are, however, of opinion that the Civil Judge has put the right construction upon the regulations.

Regulation V of 1822 merely authorized the disposal by Collectors of suits summarily cognizable by the zila' courts under Regulation XXVIII and Regulation XXX of 1802. Nothing whatever is to be found in those Regulations with respect to disputes on matters of irrigation. But section 4, Regulation XII of 1816, defined the disputes which under that Regulation were referrible to village and district pañcháyats, and, amongst others, disputes between proprietors, renters, and their ryots, respecting the occupying, cultivating, and irrigating of land in districts where the land revenue was fixed. Then section 18 of Regulation V of 1822 extended the provisions of the former Regulation to all disputes between ryot and ryot respecting the occupying, cultivating, and irrigation of lands, whether permanently settled or otherwise; and nothing is said as to the mode of proceeding. Reading section 18, Regulation V of 1822, and section 4, Regulation XII of 1816 together, we think the only reasonable construction is that the disputes mentioned in section 18 are subjected to the procedure provided by the Regulation XII of 1816. Section 18, is the only section in Regulation V of 1822 having any reference to disputes in matters relating to irrigation. We are therefore clearly of opinion that the Sub-Collector had jurisdiction over these disputes solely under Regulation XII of 1816, and that, in adopting the different procedure of Regulation V of 1822, he acted without jurisdiction. The result is that in our judgment the order of the Civil Judge is correct, and that this special appeal must be dismissed with costs.

Appeal dismissed.

Original Jurisdiction (a)

In the Goods of GIRDAR DÁ'S VALLABA DÁ'S deceased.

The bare possibility that the Act of Limitations may ultimately become a bar to the recovery of assets, is not such danger of misappropriation as warrants the granting to the Administrator General of an order under sec. 12 of Act VIII of 1855.

Semble a debtor to the estate of a deceased person cannot apply for an order under that section.

1863. *Jan.* 28, 30. *February* 27.

THIS was a petition by Mr. John Miller, the Administrator General of Madras, under section 12 of Act VIII of 1855, that an order might be made directing him to apply for letters of administration to the estate of Girdar Dás Vallaba Dás deceased with his will annexed.

According to the statements in the petition, Girdar Dás Vallaba Dás, a saukár, died at Madras on the 21st of April 1841, having on the same day made his will in Telugu to the following effect. "After my death my property should go to my brother Dámodara Dás Vallaba Dás and to my son Varjilál Dás. Balakistna Dás Murali Dás should look after all the money-dealings of my *kóṭhí(b)* at Madras, and should collect and keep them. The said Balakistna Dás Murali Dás should conduct himself according to my brother Dámodara Dás Vallaba Dás' order. Thus I have with my consent caused this will to be written while in the possession of my faculties. Besides this, a list containing charity [*sic*] and legacies to others has been caused to be written, and my brother Dámodara Dás Vallaba Dás shall perform according thereto. My brother Dámodara Dás shall with reference to the practice of the *kóṭhí* perform that which may meet with his pleasure."

Probate of this will was granted by the late Supreme Court on the 9th of December 1841 to Dámodara Dás as the executor constructively appointed by the testator.

In 1857 Dámodara Dás died at Mysore intestate and leaving Varjilál Dás, Girdar's son, him surviving.

At the death of Dámodara there were several outstanding debts to Girdar's estate. One of these was a large sum

(a) Present Scotland, C. J. and Bittleston, J.

(b) Tam. கோட்டி kóṭṭi from Sanskrit koshṭha '*vorrathskammer*' Böhtlingk and Roth, '*treasury*' Wilson. Here it means a banking-house.

owing by the late Nawáb of the Carnatic. Another was a sum of 180,000 rupees or thereabouts owing by Azíz-ul-Mulk Baháḍur, and secured by pledge of certain jewels, valued at 300,000 rupees, and deposited with Girdar's *kóṭhí*. 1863. *Jan.* 28, 30. *February* 27.

In February 1859 Varjilál Dás, by his attorney Balakistna Dás, preferred his claim under Act XXX of 1858, (" An act to provide for the administration of the estate and for the payment of the debts of the late Nawáb of the Carnatic") for the recovery of the debt owing by the Nawáb; and by an order made on the claim, dated 27th February 1860, it was ordered that the Receiver of Carnatic property should, on the production of letters of administration to Girdar's estate with the will annexed, pay to the Administrator named the sum of 73,791-7-8 rupees.

Varjilál Dás did not apply for the letters of administration with the will annexed. But Balakistna Dás in December 1860 petitioned the late Supreme Court that letters of administration of the estate and effects of Girdar Dás with his will annexed limited to the outstandings due and owing to the *kóṭhí* in the will mentioned might be granted to him as the constructive executor. In consequence, however, of an intimation received from Varjilál no proceedings were taken on this petition.

On the 28th of February 1862 Balakistna filed another petition in the late Supreme Court praying that probate of Girdar's will, limited to the outstanding debts due to the *kóṭhí*, might be granted to him as constructive executor. This petition came on for hearing and was refused.

No further proceedings were taken in the matter of Girdar's estate. The 73,791-7-8 rupees remained in the hands of the receiver, yielding no interest to Girdar's representatives, and the present petition alleged that the receiver threatened to return that sum to Government unless letters of administration with the will annexed to Girdar's estate were taken out and produced to him.

The petition further alleged that Azíz-ul-Mulk, being as aforesaid interested as mortgagor in the due administration of Girdar's estate, caused his attornies to write to the Administrator General stating the particulars of his debt to

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Girdar's estate: and that on the 15th of January 1861 such debt amounted to 252,170-9 rupees; that he had offered to pay off the debt and redeem the jewels; that he had even authorised the present managers of the *kóṭhí* to sell the jewels, and after deducting the amount due, to pay the balance to him: that his attempts to close the accounts were unsuccessful, the *kóṭhí* managers disputing the amount due, and alleging want of authority from Varjilál to return or sell the jewels: that meanwhile interest at a high rate was running against him; and that dishonest conduct with regard to the jewels might reasonably be apprehended.

The stating-part of the petition concluded by charging that unless administration of Girdar's estate with will annexed were issued, the sum in the possession of the receiver and the pledge-debt of 252,170-9, with subsequent interest, would remain uninvested and unproductive, and the right to recover the same would be endangered, and would be shortly barred under the Indian Limitation Act; that Azíz-ul-Mulk would be put to unnecessary expense in being obliged to pay interest on his debt; and that the petitioner was desirous of obtaining an order under section 12 of Act VIII of 1855.

This section enacts that:

" Whenever any person, whether a Muḥammadan or a Hindú or not, shall die leaving assets within the local limits of the jurisdiction of Her Majesty's Supreme Court of Judicature at any of the said Presidencies, it shall be lawful for the Court *upon the application of any person interested in such assets or in the due administration thereof,* either as a creditor, next of kin *or otherwise,* or upon the application of a friend of any infant who may be so interested, *or upon the application of the Administrator General, if the applicant shall satisfy the Court that danger is to be apprehended of the misappropriation of such assets,* unless letters of administration of the effects of such person are granted, to make an order directing the Administrator General to apply for letters of administration of the effects of such person."

Branson for the petitioner.

SCOTLAND, C. J., after remarking that the words "interested in such assets" clearly meant "having a direct interest or share in them," and that the Act did not appear to contemplate a debtor to the estate becoming an applicant for an order under the section cited, said that the Court was not satisfied that any danger was to be apprehended of the misappropriation of the assets.

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BITTLESTON, J. concurred, and the petition was accordingly refused.

On the 30th of January *Branson* again mentioned this case. He referred to *Wms. Exors.* 5th ed. p. 455 in support of his proposition that administration might be granted to a person not beneficially interested in the estate*(a)*, and insisted that the risk of the debt due to Varjilál becoming barred by the statute was such 'danger' as was contemplated by the section. He also said that the money in the hands of the receiver of the Carnatic property was in danger, and referred to Act XIV of 1859 section, 19.

BITTLESTON, J. :—Why should the Administrator General apply? The clause giving him a general power to do so only operates when it is brought to his notice that property of a deceased person is in danger of being misappropriated, and that there are no persons interested in such property or the due administration thereof.

SCOTLAND, C. J. :—We will consider the case, bearing in mind one point that bears materially upon the application —namely, that we cannot compel a native to administer.

Cur. adv. vult.

On the 27th of February 1863, the judgment of the Court was delivered by

SCOTLAND, C. J. :—This is an application by the Administrator General under section 12 of Act VIII of 1855 for an order directing him to apply for letter of administration of the estate and effects of Girdar Dás deceased, left unadministered by Dámodara Dás deceased, the executor with probate of the will of Girdar Dás.

(a) See *In the goods of Fenton* 3 Add. 36 n.*(a)*, where the representatives of a trustee in whom a term of years was vested were dead.

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It appears from the petition that Girdar Dás died on the 21st of April 1841, leaving an only son, and that Dámodara Dás obtained probate of his will on the 9th December 1841, and died on the 25th October 1857. Girdar Dás at his death was carrying on the business of a *kóṭhí* at Madras, and the petition states that at the death of Dámodara Dás there remained outstanding and due to the estate of the said Girdar Dás, amongst other debts, a sum of 180,000 rupees or thereabouts, due from Azíz-ul-Mulk to the *kóṭhí* on the security of jewels deposited of the value of Rs. 300,000 or thereabouts, and also another debt due from the estate of the late Nawáb, in respect of which there was now in the hands of the Receiver of the Carnatic property the sum of rupees 73,791-7-8, to be paid, under an order of the late Supreme Court of the 27th February 1860, to the personal representative of Girdar Dás on production of letters of administration. The son of Girdar Dás has been living for the last sixteen years at Mysore, and it is stated that in December 1860 he threatened to enter a caveat against an application for letters of administration by Balakistna Dás and that in consequence the application was not proceeded with.

It does not appear that the deceased left any other relations. The business of the *kóṭhí* is still being conducted on behalf of the son: the jewels deposited now remain with the *kóṭhi*: it appears that no notice of this application has been given to the son; and there is nothing in the will opposed to his representative rights.

The section under which the application is made is applicable to the assets of Muḥammadans and Hindús; and requires that the Court shall be satisfied that danger is to be apprehended of the misappropriation of such assets, unless letters of administration of the effects of the deceased are granted. Then what is there in the case to satisfy us of that? It has been urged that the debtor to the estate, Azíz-ul-Mulk, is paying interest upon his debt, and is anxious to discharge it and receive back the jewels, and is unable to do so, and that, in respect of such jewels there is danger of misappropriation. But a sufficient answer to this, we think, is, that as respects the estate of the deceased Girdar Dás, the debt is amply secured by the jewels which remain with

the *kothi*, and that letters of administration are not necessary to enable the debtor to take legal proceedings to discharge himself of the debt, and get back his jewels from the son as the legal successor and representative of the deceased. 1863. *January* 28, 30. *February* 27.

Another ground put forward was, that there was danger of misappropriation of the money in the hands of the receiver of the Carnatic property, as it could only be paid upon the production of letters of administration, and that the act of limitations would in time be a bar to its recovery. This also we think is not sufficient to warrant the granting of the order under the section. There is no present danger of the loss or misappropriation of the money; and without saying that a case may not occur in which the likelihood of outstanding debts being barred by the law of limitations would be considered sufficient danger of misappropriation within the section, we think it cannot be so treated in this case, considering that several years must yet elapse before the law of limitations could even be set up as a bar, and that the deceased's son is aware of the right to receive the money and may, at any time, entitle himself to it, and as sole legal representative may be made responsible if there are any others interested in the assets of the deceased. No more at present appears than the bare possibility of the act of limitation being allowed to become a bar, and that, without any present danger of loss or misappropriation, is clearly not enough. As far as now appears before us, the Administrator General would, if the order were made, have only to hand over the monies received by him to the son of the deceased.

The application, we think, must be refused.

Petition refused.

Appellate Jurisdiction (a)

Regular Appeal No. 40 *of* 1861.

LAKSHMI AMMA'L.....................*Appellant.*

TI'KARA'M TOVAJI.....................*Respondent.*

A suit between two brothers, A and B, respecting ancestral property was compromised and the particulars of the compromise embodied in a rázínáma presented in Court by both parties. A having died, his widow and B presented in Court another rázínáma embodying the particulars of an arrangement respecting the property in which she had become interested as widow and which was comprised in the former rázínáma and of this second rázínáma they subsequently put in an amended copy:—*Held*, that a claim arising out of such arrangement could not, within the meaning of Act VIII of 1859, sec. 2, be considered to have been a cause of action heard and determined in the former suit.

A plaint will not be rejected under sec. 32 of Act VIII of 1859, if the subject-matter alleged raises a fair question of claim or right for trial and determination between the parties. The mere unlikelihood of the plaintiff's success is not enough to justify the rejection of his plaint.

1863. *March* 2. *R. A. No.* 40 *of* 1861.

THIS was a regular appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Original Suit No. 1 of 1853. The suit was brought by a Hindú widow to recover property which had belonged to her husband and vested in her on his death, and the claim now set up arose out of an arrangement between the plaintiff and the deceased's brother the first defendant, the terms of which were embodied in a rázínáma (filed on the 22nd July 1854) of which the following is a translation.

TO ALEXANDER WILLIAM PHILLIPS, ESQ., *the Acting Sub-Judge in charge of Madura.*

The motion submitted by Rámachendr aSástríyár, pleader, on behalf of Lakshmi Ammál, the wife of Jeyarám Tovaji Ayyar the deceased plaintiff, in Original Suit No. 1 of 1853 on the file of the said Court, and by Gurusvámi Sástriyár pleader, on behalf of Tíkarám Tovaji the first defendant in the said suit.

In the said suit the plaintiff and the first defendant filed a rázínáma. On becoming possessed under the terms thereof of certain properties, moveable and immoveable, the plaintiff died on the 29th May 1854. The first defendant, therefore, is entitled to protect the plaintiff's widow Lakshmi Ammál. He and the said Lakshmi Ammál entered into a compromise, stipulating that, out of the properties noticed in the rázínáma, saving those moveable and im-

(a) Present Scotland, C. J. and Strange, J.

moveable in the possession of Lakshmi Ammál and the garden to the west of the Nárayaṇapákku Bungalow, the first defendant should take possession of the Kochatai garden, the Náráyaṇapákku Bungalow, the village of Achambattu, and the sicca rupees 29,200 in bonds; that the first defendant, in keeping up the customary allowance made by the plaintiff, should, from the income of the said properties, pay monthly on the 30th of every month from this July, rupees 30 to the said Lakshmi Ammál, rupees 10 to the plaintiff's brother-in-law Miyari Rámatívárí, and rupees 15 to the plaintiff's elder sister's son Sandiramie Pattya; that he should further, within the 30th of every Panguni from the Panguni of A'nanda, convey to the house of the said Lakshmi Ammál and measure out to her 20 kalams of milagu paddy, and equal quantities of samba and vellakkádi paddies; and that, in default of payment of any instalment of money or paddy, the allowance of paddy for the year and of rupees 55 should be compellable under a precept of the Court. On the 5th July this year, a petition was accordingly presented, which has been filed. But, as in the above petition it is not explicitly provided for that the said Lakshmi Ammál should continue in the receipt of rupees 55 per mensem, and that in default the payment thereof should be enforceable under a precept of the Court, we pray that this provision may be accepted by the Court.

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(Signed) RA'MACHENDRA SA'STRI, *Vakíl.*

(„) GURUSVA'MI SA'STRI'.

Mayne for the appellant, the plaintiff.

Branson for the respondent, the defendant.

The other facts of the case sufficiently appear from the following

JUDGMENT:—The plaintiff, as the widow of one Jeyarám Tovaji, brought this suit for recovery of property belonging to her husband and vesting in her on his decease.

The defendant is Tíkarám Tovaji, brother of the deceased.

Jeyarám Tovaji had brought a suit against his brother, to recover from him possession of patrimonial property. This suit, No. 1 of 1853, ended in a compromise

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pursuant to which one-third of the property was devoted to a charitable purpose, and the brothers divided the residue equally Jeyarám had at the time possession of a portion of his allotted share, and the remainder was to be made over to him by Tíkarám, after which each was to have absolute controul over his share with independent right of alienation. These particulars were embodied in a rázíná-ma presented in Court by both parties on the 9th December 1853. As stipulated, Tíkarám made over possession of certain property to Jeyarám, after which, on the 29th May 1854, Jeyarám died.

On the 5th July of the same year the present plaintiff and the defendant Tíkarám filed in Court an instrument in writing, bearing date the 5th July, of which on the 22nd of the same month they put in an amended copy. In this instrument it is stated that Jeyarám having died, the defendant was entitled to take under his protection Jeyarám's widow (the plaintiff). It is then stated that she and the defendant had entered into a compromise before certain arbitrators, and that it had been agreed that the property mentioned in the aforesaid rázínáma, with certain reservations, should be made over to the defendant, and that out of the income thereof he should provide the plaintiff with certain allowances in money and grain, failing which these allowances should be levied by process of Court.

The plaintiff rests her right to maintain the suit upon the grounds that she did not absolutely relinquish all right to the property, that the defendant made away with part of the property made over to him contrary to the terms of the last mentioned instrument, and that she had ceased to have confidence in him for the safe custody of the rest and the payment of the allowances agreed upon.

The Civil Judge, under sections 2 and 32(a) of the Code of Civil Procedure, rejected the plaint upon its presentation,

(a) Act VIII of 1859, sec. 2, enacts that "the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

Sec. 32 enacts that "if upon the face of the plaint, or after questioning the plaintiff it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so."

apparently treating the agreement of the 5th July 1854 as a rázínáma upon which the cause of action in the suit No. 1 of 1853 was determined, and that therefore section 2 prevented his taking cognizance of the suit. He seems, further, to have considered that under section 32 the subject-matter of the plaint did not constitute a cause of action.

1863. *March* 2. *R. A. No.* 40 *of* 1861.

Against this decision the plaintiff has appealed, and we are of opinion that the Civil Judge was not warranted in the preliminary rejection of the plaint.

We are unable to see any ground for considering the agreement of the 5th July 1854 as a rázínáma so connected with the suit No. 1 of 1853, as that the alleged cause of action in this suit can be held to have been heard and determined in the former suit. That suit appears to have been brought to a termination by the rázínáma presented by the brothers (parties to the suit) on the 9th December 1853. The matter in litigation between them was completely adjusted by the provisions of such rázínáma. On the death of Jeyarám a fresh interest sprang up in the person of his widow, now the plaintiff, and the present claim arising out of an arrangement made with Tíkarám in respect of property in which she became interested as widow cannot because of the petition filed in the Civil Court in July 1854 be considered to have been a cause of action heard and determined in the former suit, within the meaning of the 2nd section. The suit therefore, we think, should not have been dismissed summarily as one of which the Civil Court could not take cognizance under section 2 of the Code of Civil Procedure.

Then as regards the rejection of the plaint under section 32, it does not we think, appear that the subject-matter of the plaint does not, constitute a cause of action. Whether there appears to be a cause of action that is likely to succeed is not the question. It is enough, we think, if it appears that the subject-matter alleged raises a fair question of claim or right for trial and determination between the plaintiff and the party made defendant. Where that is the case the plaintiff is entitled to institute his suit and to have it regularly proceeded with and fully heard, and a decree pronounced upon the matter in question. Here the Civil Judge deciding upon what appeared in the plaint, has,

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of 1861.

by rejecting the plaint, refused to allow a suit to be instituted.

Now the plaintiff's alleged cause of action is the breach of the agreement of the 5th July, and this depends upon the meaning and effect to be given in the construction of the agreement to the language used, as regards the intention of the parties. For this purpose evidence of the position and circumstances in which the parties were at the time placed, and under which they entered into the agreement, is admissible, and may (we do not say it will) be relied upon and materially affect in the plaintiff's favour, the question of the intention and meaning of the words used in the agreement. But before there has been an opportunity of considering these circumstances in evidence it cannot rightly be decided that the plaintiff's construction of the agreement is wrong, and that she has absolutely parted with the property which she claims to have inherited from her husband.

The case is in its nature such as to make it probable that circumstances proper for consideration in construing the agreement will be relied upon. But without further alluding to them, or in any way intending to express an opinion as to the construction of the agreement, or the ultimate success of the plaintiff's alleged cause of action, we are of opinion that there appears no sufficient ground to warrant rejection of the plaint under section 32, and that the Civil Judge ought to receive the plaint and proceed to hear and determine the suit in the proper and ordinary way.

Appeal allowed.

Original Jurisdiction.

Original Suit No. 44 *of* 1862.

MOHIDI'N *against* MUHAMMAD IBRAHI'M and others.

In a foreclosure-suit in which A was plaintiff and B, C and D were defendants:—*Held*, that A was estopped by a previous verdict on the point in issue in an ejectment in which C and D were plaintiffs and A was defendant.

1863. *March* 4. O. S. No. 44 of 1862.

THE plaintiff claimed rupees 10,485-12-5 due on a mortgage of ten houses in Black Town, dated the 28th of September 1861, and made by the defendant Muhammad Ibrahím, to secure re-payment to the plaintiff of 10,000 rupees within one year and on a rent-agreement of the same date; and that in default of payment the defendants should be foreclosed.

On the 15th of January 1862, the defendants DeSouza and Cammiade, having obtained a verdict in the late Supreme Court against the mortgagor for rupees 15,098, caused the Sheriff of Madras to seize and sell the mortgaged premises under a writ of fieri facias, and bought them all, with the exception of one house No. 1 in Míra Labbai Street. And on the 6th of April 1862 they commenced an action of ejectment in the late Supreme Court at Madras to recover one of the houses which they had so bought, and which was then in the possession of a tenant of the mortgagor's. The plaintiff Mohidín was let in to defend, and upon the trial of the action he claimed title to the house as mortgagee in possession and produced the instrument of mortgage in support of that title. Mohidín failed to establish the genuineness of his mortgage and a verdict was accordingly found for DeSouza and Cammiade.

The first issue in the present suit was whether the mortgage was genuine. The second was whether under the circumstances the Court was precluded from taking cognizance of the suit by section 2 of the Code of Civil Procedure.

That section provides that "the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim."

(*a*) Present Scotland, C. J. and Bittleston, J.

1863. March 4. O. S. No. 44 of 1862.

The proceedings in the former action were put in.

The Advocate General (*Norton* with him) for the plaintiff, referred to the note to the *Duchess of Kingston's Case*, in 2 Smith's *Leading Cases*.

Branson (*Arthur Branson* with him) for the defendants, contended that the plaintiff was estopped by the judgment in the former action.

SCOTLAND, C. J.:—It will be best to amend the second issue. Let it stand thus: whether or not by reason of the former judgment the plaintiff is estopped from having the present suit heard and determined.

The amendment was accordingly made.

SCOTLAND, C. J.:—We are clearly of opinion that the point in issue as to the mortgage was decided in the former action. No proposition of law is more firmly established than that when in a former suit the parties were the same, and appeared in the same capacity, and the same point was in issue, the judgment on such point is conclusive on those parties. It is not necessary that the form of action should be the same in each case. Nice questions were raised under the old system as to whether the benefit of an estoppel was waived by a party who did not plead it when he had an opportunity of doing so. But here of course all question on this score is got rid off by the issue on the record.

The facts of the present case are that the present second and third defendants were the plaintiffs in the former action respecting one of the ten houses comprised in the present suit. In that action the present plaintiff was a defendant: the same mortgage was set up as in the present case: the present plaintiff claimed as mortgagee under that instrument; and the Court gave judgment to the effect that the document in question was not genuine.

Now nine other houses are in litigation, but under precisely the same claim of right set up in respect of the self-same mortgage. Consequently as between Mohidín on the one part and DeSouza and Cammiade on the other, the identical point has been adjudged and must be considered to be so as regards the nine houses. As regards those houses, therefore, the plea of estoppel is established. The

Advocate General contended that the fact of another name being introduced as a party, distinguished the present case from others. But that cannot be so in this case. Otherwise every case of estoppel by judgment *inter partes* might be got rid of by introducing a man of straw as a plaintiff or defendant in the subsequent suit. Here the additional party is the alleged mortgagor who makes no defence, and the mortgage being invalid, the other defendants are admittedly entitled to the nine houses as his execution-creditors. As to the tenth house the case is admitted by the first defendant, and the plaintiff must have a verdict for it. The defendants DeSouza and Cammiade are entitled to a verdict as to the remaining nine. 1863. *March* 4. *O. S. No.* 44 *of* 1862.

The second and third defendants will have their costs in full. The plaintiff will have his costs against Muḥammad Ibrahím down to the time of the settlement of issues.

Original Jurisdiction (a)

Brass *against* Tiruveṅgada Piḷḷai.

The High Court has no power under the Civil Procedure Code to award costs to the defendant when the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter.

THIS case was in the daily cause-paper, but the plaintiff, before it was called on for trial, withdrew from the suit, without having asked permission of the Court to do so with liberty to bring another suit for the same cause of action. 1863. *March* 4.

Branson for the defendant applied for costs, and referred to sections 97 and 187 of Act VIII of 1859.

Per Curiam :—We cannot grant costs. Sections 97 and 187 are the sections in the Civil Procedure Code which empower the Court to award costs. The former section does not apply, as the plaintiff has not asked for leave to withdraw and bring a fresh suit for the same matter. Section

(a) Present Scotland, C. J. and Bittleston, J.

1863. March 4. 187 provides that "the judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion;" and though it goes on to say "and the Court shall have full power to award and apportion costs in any manner it may deem proper," it must necessarily be read as only applicable when judgment is given.

Application refused.

Appellate Jurisdiction (a)

Special Appeal No. 25 *of* 1862.

KO'NDI ME'NO'N..........................*Appellant.*
SRA'ṄGINREAGAṬṬA AHAMMADA.....*Respondent.*

According to Malabar law a sale of family property is valid when made with the assent, express or implied, of all the members of the tarawád, and when the deed of sale is signed by the káraṇavan and the senior anandravan if sui juris.

Such signature is prima facie evidence of the assent of the family, and the burden of proving their dissent rests on those who allege it.

1862. March 5. S. A. No. 25 of 1862. THIS was a special appeal against the decree of H. D. Cook, Civil Judge of Calicut, in Appeal Suit No. 219 of 1861, affirming the decree of the District Munsif of Kacheri in Original Suit No. 195 of 1858.

The suit was instituted for the possession of a paramba with arrears of porapád; and the question was whether a sale by the káraṇavan and the eldest anandravan for the benefit of the tarawáḍ was valid, the appellant, a junior member of the tarawáḍ, not having joined in the deed whereby the sale was effected. The Civil Judge found that the sale had been made to pay debts which a former karaṇavan had incurred for the benefit of the family, and that the instrument of sale had been executed by the káraṇavan and the senior anandravan.

Mayne, for the appellant, the fourth defendant, contended that it was necessary to the validity of the sale that all the anandravans should execute the instrument of sale, or at all events that the chief anandravans should give their assent in writing. He cited Strange's *Manual of Hindú*

(a) Present Frere and Holloway, J J.

1862. March 5. S. A. No. 25 of 1862.

Law § 379. "The káraṇavan can alienate all moveable property, ancestral or self-acquired, at his discretion. But as to immoveable property, whether self-acquired or ancestral, he must have *the written assent* of the chief anandravan. (Decree of late Pro. Court Western Division in Appeal No. 27 of 1839; of late Zillah Court of Malabar in S. A. No. 29 of 1840; of S. U. in Appeal No. 5 of 1845)."

Miller for the respondent, the plaintiff.

FRERE, J.:—It is not necessary that all the anandravans should execute.

HOLLOWAY, J.:—We must give Mr. Mayne the credit of having said, and said well, all that could reasonably be urged on behalf of his client. But the Civil Judge has found him out of Court. All that is necessary is that the sale should be made with the assent, express or implied, of all the members of the tarawáḍ, and that the káraṇavan and the senior anandravan (if sui juris) should join in the deed of sale. Such assent will be implied where, as in the present case, the sale is found to have been for the benefit of the family. Here the District Munsif and the Civil Judge have also found that the káraṇavan and the senior anandravan executed the deed. Such execution is *prima facie* evidence of the assent of the whole family. The onus of proving their dissent rests on those who deny their assent. No such evidence has been offered, and the appeal must therefore be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 63 *of* 1862.

NI'LA'YATA'TCHI.........................*Appellant.*

VENKATACHALAM MUDALI..............*Respondent.*

Where an issue has been directed and the finding and evidence returned, a special appellant cannot take an objection going to the merits which otherwise would not properly be open upon special appeal.

Sec. 25 of Act XXIII of 1861 gives no rights inconsistent with sec. 372 of Act VIII of 1859.

1863. *March* 9. *S. A. No.* 63 *of* 1862.

THIS was a special appeal against the decree of E. W. Bird, the Acting Civil Judge of Negapatam, in Appeal Suit No. 132 of 1861, affirming the decree of the District Munsif of Tranquebar in Original Suit No. 18 of 1859.

The question raised in the original suit was whether a sale of family-property had been made without the consent of the plaintiff, a co-sharer, and whether therefore such sale was invalid to the extent of his share. On a former hearing the High Court directed an issue, the finding on which was returned with the evidence. To this finding the appellant, the first defendant, filed a memorandum of objection on the ground that the Civil Judge ought under the circumstances in evidence to have found acquiescence on the part of the plaintiff. The question now was whether the special appellant could on the evidence and finding take an objection going to the merits which otherwise would not properly be open upon special appeal?

Branson for the special appellant, the first defendant. There has been an issue directed to the Civil Court: the finding thereon has been returned together with the evidence: such finding and evidence have become part of the record; I am therefore entitled, under Act VIII of 1859, section 354, to take an objection going to the merits. That section enacts that "if the lower court shall have omitted to raise or try any issue, or to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame an issue or issues for trial by the

(a) Present Scotland, C. J. and Frere, J.

1863. March 9. S. A. No. 63 of 1862.

Lower Court, and may refer the same to the lower Court for trial. Thereupon the Lower Court shall proceed to try such issue or issues and shall return to the Appellate Court its finding thereon, together with the evidence. Such finding and evidence shall become part of the record in the suit and either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding; and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal."

SCOTLAND, C. J.:—This is a special appeal, which only lies on the grounds mentioned in section 372 of the Code of Civil Procedure, namely, on the ground of the decision appealed from being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits, and on no other ground. It is clear that if Mr. Branson's construction were to be upheld we should be indirectly getting out of the effect of that provision. He says that as there has been an issue directed to the Civil Court, and the finding thereon has been returned, together with the evidence, and such finding and evidence have become part of the record, he is entitled, under section 354 of the Civil Procedure Code, to take the objection that the finding is contrary to the evidence. But to that extent the provisions contained in section 354 only relate to *general* appeals, and the special appellant in the present case can clearly not avail himself of them. Then there is section 25 of Act No. XXIII of 1861, which provides that when the application for the admission of a special appeal is correctly drawn up, it shall be registered as therein mentioned, and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules thereinbefore provided for such appeals so far as the same shall be applicable. But it is clear that this section is to be read in connection with the provision relating to the grounds of special appeals. The application, it is expressly provided, must state some ground on which a special appeal will lie under section 372 of Act VIII of 1859. And on the whole it is obvious that no rights are given by section 25 of Act XXIII of 1861 which are inconsistent with section 372 of the former Act. We must therefore now confine ourselves

1863. March 9. S. A. No. 63 of 1862.

to such objections, if any, as are made consistently with that section: Mr. Branson grants that the Civil Judge's decision is not contrary to law or usage, and that there has been no substantial error or defect *in law* in the procedure or investigation of the case; and we must accordingly dismiss this appeal.

FRERE, J. concurred.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 576 *of* 1861.

NA'YAN MAṆṆI and others.........*Appellants.*
GO'DA SHANGARA.....................*Respondent.*

Before the enactment of Act VIII of 1859 a suit could not be brought for a mere declaration of title without consequential relief.

A suit cannot be brought against several defendants to eject one and to obtain a declaration of title against the rest.

1863. March 12. S. A. No. 576 of 1861.

THIS was a special appeal from the decision of E. Cullin the Principal Ṣadr Amín of Cochin, in Appeal Suit No. 128 of 1857, affirming the decree of the District Munsif of Vellanjode, in Original Suit No. 35 of 1855. The suit was brought to eject one defendant, the 108th, who did not appear, and to obtain a declaration of right against the two hundred and twenty one others. The Munsif and, on appeal, the Principal Ṣadr Amín decreed for the plaintiff. Eight of the defendants now specially appealed.

Branson (*Saḍagópáchárlu* and *Rájagópáláchárlu* with him) for the appellants.

Norton (*Karuṇágara Manavan* with him) for the respondent, the plaintiff.

A written judgment, from which the following is an extract, was delivered by

STRANGE, J.:—At the period when this suit was brought no law existed sanctioning suits for mere declaration of title without prayer for consequential relief. Upon this ground alone that part of the action with which we are now dealing

(a) Present Strange and Holloway, J J.

was in our opinion, untenable. Having a remedy to seek, namely the ejectment of tenants denying his title, the plaintiff was not warranted in demanding merely to have his title recognized, reserving to himself whatever other steps he might see fit to take with regard to his recusant tenants. Equally unwarranted was he in bringing a suit of this mixed order. Having been required by the late Ṣadr Court to sue all his tenants conjointly, the plaintiff had certainly no course left him but to take the step indicated to him, and of the propriety of such a step, when so directed, we do not feel called upon to judge. But we must certainly object to an action such as the present, wherein the plaintiff, in dealing with his alleged tenants, seeks to eject one of them, and to attain no more than a declaration of title as respects the rest. He was bound, if ejectment was his aim, so to have shaped his action as regards all the tenants; or, if declaration of title was what he required, and the law at the time of the suit sanctioned a suit of such a description, to have confined his suit to that special subject.

1863.
March 12.
S. A. No. 576 *of* 1861.

We consider that part of the suit with which we are occupying ourselves not sustainable, for the reasons above given, and we are furthermore of belief that the suit has been framed in its present shape evasively, in order to permit of its institution before a judicatory which could not have entertained it had the plaintiff set forth his demands in all their proper fulness.

We consequently reverse all such parts of the decrees below as affect any of the defendants but the 108th, and we dismiss the suit with costs as regards all the other defendants.

Appeal allowed.

Appellate Jurisdiction (*a*)

Civil Petition No. 141 *of* 1862.

Ex parte BA'SHIYAGA'RULU NA'YUḌU.

When a suit has been dismissed for want of evidence and the plaintiff's special appeal was dismissed, and the wanting evidence was subsequently discovered, the High Court's special permission is not necessary to enable the plaintiff to apply for a review to the Court in which the suit was brought.

Semble he has no right to make such application under Act VIII of 1859, sec. 376.

Orders on *Civil Petitions Nos.* 203 and 230 *of* 1862 not followed.

1863. *March* 12. *Civ. P. No.* 141 *of* 1862.

THE petition stated as follows. The suit of *Báshiyagárulu Náyuḍu* v. *Gurusvámi Náyakkan* was dismissed by the Principal Ṣadr Amín of Chingleput on the ground that there was no evidence to shew that the plaintiff (the petitioner) or his ancestors ever possessed any land in either of the two villages mentioned in the plaint. The petitioner applied to the High Court, but his Special Appeal, No. 799 of 1861, was dismissed on the 15th of November 1862. Since the decision in the Court of the Principal Ṣadr Amín the petitioner has discovered documents which supply the evidence declared by that Judge to be wanting. This evidence can only be used as a ground for applying for a review in the lower Court; but under section 376 of Act VIII of 1859*(b)*, no such application can now be made without special permission.

The petitioner therefore prayed for a declaration that the Principal Ṣadr Amín was at liberty, if he should think proper, to take into consideration the fresh evidence, and to review his judgment.

(a) Present Strange and Holloway, J J.

(*b*) This section enacts that any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a Superior Court—or by a decree of a District Court in appeal from which no special appeal shall have been admitted by the Ṣadr Court—or by a decree of the Ṣadr Court, from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council—and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him—may apply for a review of judgment by the Court which passed the deçree.

Mayne for the petitioner, cited an unreported decision of the late Madras Ṣadr 'Adálat in *Civil Petitions Nos.* 203 *of* 1862, and 230 *of* 1862, on 11th August 1862, where it was held that the discovery of new evidence was no ground for appeal in the Ṣadr 'Adálat: that the application for review should be addressed to the lower court, but that the Ṣadr 'Adálat will sanction such application.

1863. March 12. Civ. P. No. 141 of 1862.

Saḍagópáchárlu for the defendant.

PER CURIAM.—We are not inclined to follow the decision cited by Mr. Mayne. This application appears to us unnecessary. If section 376 can be construed so as to admit of the right to a review of judgment in the present case (a point on which it is unnecessary to give an opinion), we think that the Court in which the petitioner brought his suit is the proper Court to apply to. The refusal of the present petition will of course not prejudice the right (if any) to make such application.

Petition dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 38 *of* 1861.

SUBBAYA and others..................*Appellants.*
YARLAGADDA AṄKINIDU.............*Respondent.*

When an island was formed in a river, the lands adjacent to the banks of which were part of a zamíndári:—*Held*, that the island was not the waste land of any village or a portion of the holding of any ryots in the zamíndári, but that the Zamíndár possessed in it all the incidents of ownership, including the power of making leases.

THIS was a regular appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 47 of 1857.

1863. March 12. R. A. No. 38 of 1861.

Mayne and *Sloan* for the appellants, the first and second defendants.

Rámánuja Ayyangár for the third appellant, the third defendant.

Norton for the respondent, the plaintiff.

(a) Present Strange and Holloway, J J.

1868. March 12. R. A. No. 88 of 1861.

The facts and arguments sufficiently appear from the following

JUDGMENT:—The suit was brought to eject the defendants from certain lands situated in the Turakapallam lanka, an island alluvially deposited in the river Kistna. The plaintiff alleged that the defendants held under a lease from one Rám Dás his lessee.

The defendants denied the holding under Rám Dás, alleged a holding directly under the plaintiff and contended that plaintiff was entitled to the Zamíndár's share only, and could not eject them as long as they paid it.

The Civil Judge decreed for the plaintiff, considering the lease under Rám Dás proved.

It was not, as indeed it could not be, denied that the property in the land in question resided in the plaintiff. But it was argued that, although the plaintiff had an election whether he would let this land to the defendants, that having exercised his election he was bound perpetually to renew, and could not eject the defendants, and the defendants' counsel referred to section 8 Regulation V of 1822(a).

It is unnecessary to give any opinion whether the view of the Civil Judge that the defendants held under Rám Dás is or is not correct, although with exhibit XXIX before us (" account shewing the amount of kist collected and remitted to the Zamíndár by the karanams in 1265 (A. D. 1855-56) on Turakapallam lanka, which was rented by Rám Dás") it would be almost impossible for us to say that we are satisfied that he is wrong.

It is also unnecessary to give any opinion upon the construction of the Regulation, for the case is determinable

(a) This section enacts that

First. The lands of under-farmers or ryots shall not be granted to other persons by proprietors or farmers under the provisions of sec. 10, Regulation XXX of 1802, until such proprietors or farmers shall have made application to the Collector and obtained his leave for that purpose.
Second. If the Collector on examination find the rates of the pattá tendered by the proprietor or farmer to be just and correct, the under-farmer or ryot shall be ejected under the Collector's order, unless he assent to the terms; but if the rate shall exceed the just rate prescribed, an order shall be issued by the Collector to the proprietor or farmer prohibiting the ejectment, and requiring the issue of a pattá within one month from the delivery of the order to him, under penalty for delay as provided in section 8 Regulation XXX of 1802.

in a manner perfectly satisfactory to our minds from the contract between the parties.

1863. *March* 12. *R. A. No.* 38 *of* 1861.

The island deposited, until some act was done by the Zamíndár, was not the waste land of any particular village, and still less was it a portion of the holding of any particular ryots. It rather resembled an entirely independent property over which the Zamíndár possessed all the incidents of ownership. He might either let it or retain it. He let it to the defendants, and they agreed to take a lease for four years and to abandon the land at its conclusion. The proposition of the learned counsel for the appellants is that it matters not what the provisions of the contract between the parties, they are clearly subject to the incidents of perpetual renewal—that the Zamíndár may not terminate his will, though the tenants may. Whether a special contract even for land which was the waste of the village of the lessees could be construed in this unexampled manner it is unnecessary to determine.

We are clearly of opinion that this is a simple question between lessor and lessee, and that the relation of zamíndár and ryot is wholly accidental.

It is therefore the simple case of a lease for four years, and the defendants, at its termination on refusal when requested to surrender, became either wrong-doers or tenants at the option of the Zamíndár.

We are clearly of opinion that the decree of the Civil Judge is in all respects right, and we affirm it with costs.

Appeal dismissed.

NOTE.—See Inst. lib. II. tit. I, 22; D. xli. 1. 7. 4. 3,

Appellate Jurisdiction (a)

Special Appeal No. 634 *of* 1861.

KE'SAVA PILLAI..........................*Appellant.*

PEDDU REDDI and others............*Respondents.*

When a tenant by his lessor's permission erected a dam upon his holding and thereby obstructed the natural flow of the water to other lands of the lessor:—*Held* that the mere permission did not amount to a grant.

Held also that there was no implied grant of the right to use water so as to derogate from the rights of those through whose lands the stream would otherwise flow.

Held also that the right under the permission might be terminated by revocation of the latter, but that such revocation would only be permitted on the terms of the landlord paying to the tenant the expenses which that permission had led him to incur.

Even when the dominant and servient tenements are the property of different persons, a man may license an act in its inception and yet be entitled to relief when the act is found to have injurious consequences which he could not have contemplated at the time of the license.

1863. *March* 14. *S. A. No.* 634 *of* 1862.

THIS was a special appeal from the decision of George Ellis, the Civil Judge of Cuddalore, in Appeal Suit No. 61 of 1858.

Branson and *Sadagópáchárlu* for the appellant, the plaintiff.

Norton for the respondent, the second defendant.

The facts and arguments appear from the following judgment, which was delivered by

HOLLOWAY, J :—This was a suit to compel the removal of a dam erected by the tenant upon the land held by him of the plaintiff.

The Civil Judge finding that an agent of the plaintiff had assented to the erection of the dam, and that the plaintiff had ratified his act, decided that the defendant could only be compelled to remove it upon the terms of paying the defendant for the expense which he had incurred; but he did not make a decree accordingly.

It has been argued for the special appellant that the defendant having had the benefit of the dam is not entitled to any compensation.

(a) Present Strange and Holloway, J J.

On the other hand the learned counsel for the respondent has strenuously contended that the conduct of the plaintiff has amounted to a license, and that the defendant having incurred expense in consequence, the license has become executed and therefore irrevocable. For this position, the class of cases of which *Liggins* v. *Inge(a)* is the principal, was cited. That case is still an authority, as Williams, J. stated in *Davies* v. *Marshall(b).* It has not, as has been erroneously supposed, been overruled by the more recent case of *Wood* v. *Leadbitter(c).*

In truth however, *Liggins* v. *Inge* with the class to which it belongs is inapplicable to the present question. There the irrevocable license was merely construed to have prevented the plaintiff from complaining that the erection of a weir had obstructed the usual flow of water to the plaintiff's mill. It was an obstruction upon the land of the defendant by the defendant and became legalized by the act of the father of the plaintiff who, being a party to the act, was prevented from complaining.

The present is the case of a tenant erecting a dam upon his landlord's land and thereby, as is averred, obstructing the natural flow of water to other lands of the same owner. To sustain the argument of the learned counsel for the respondent, we must be prepared to hold that there is an implied grant of a right to the use of water derogating from the natural rights of those through whose lands the stream would otherwise flow. We must, in fact, hold that a positive easement has been created by the plaintiff in favour of one portion of his own property and against another. The dominant and servient tenements are the property of the same person. There are unity of title and unity of possession, for the possession of the tenant is, for the purpose of the present question, that of the plaintiff.

It is clear that no length of possession would give the defendant a title by prescription, because the possession is confessedly precarious. There can be no pretence for saying that this mere permission amounted to a grant; for, if so, on every right of way exercised merely by the permission of

(*a*) 7 Bing. 682. See too *Winter* v. *Brockwell* 8 East 308; *Gale on Easements*, 3d ed. 26, *et seq.*
(*b*) 31 L. J. C. B. 65.
(*c*) 13 M. & W. 838.

1868. March. 14. S. A. No. 634 of 1861.

the grantor an easement would be created by grant. The case is simply one of a tenant derogating from the natural rights of other tenants by permission of their common landlord.

It is quite clear that such a right, existing only by permission, may be terminated by the revocation of that permission; but following the authority of several cases in the late Sadr Court, we are of opinion that the revocation should only be permitted on the terms of the plaintiff paying to the defendant the expenses which he was induced by that permission to incur.

This was the opinion of the Civil Judge, who did not embody it in his decree. We shall alter his decree accordingly, and looking at the nature of the contention on both sides, we make no order as to costs.

We must not, however, be supposed to have decided that if the dominant and servient tenements had been the property of different persons there would have been an irrevocable license. A man may license an act in its inception and yet be entitled to relief when it is found to have injurious consequences which he could not have contemplated at the time of the license: *Bankart* v. *Houghton*(a). Whether he can or cannot revoke it is a question upon the facts of each particular case. The termination or narrowing of easements by irrevocable license and the creation of easements by such license, will probably be found to be wholly different questions; but we give no opinion now upon that subject because the first section of the Statute of Frauds presents the case to the English lawyer in an aspect wholly different to that in which, if it should ever arise, it would come before us.

Appeal allowed.

(a) 27 Beav. 425, 431, per Romilly M. R.

Appellate Jurisdiction (a)

Special Appeal No. 101 *of* 1862.

KUMINI AMA........................*Appellant.*
PARKAM KOLUSHERI...............*Respondent.*

An otti, like a kánam, mortgage cannot be redeemed before the lapse of twelve years from its date.

An otti differs from a kánam mortgage, first, in respect of the right of pre-emption which the otti holder possesses; secondly, in being for so large a sum that, practically, the janmí's right is merely to receive a pepper-corn rent.

1863. *March* 21. *S. A. No.* 101 *of* 1862.

THIS was a special appeal against the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 551 of 1861, affirming the decree of the District Munsif of Kacherri, zila' Calicut, in Original Suit No. 483 of 1859. The suit was instituted for the recovery of a paramba, the janma property of the second and third plaintiffs, who, in December 1857, assigned it on otti to the first defendant for rupees 200 and poramkadam of rupees 87-8-0 in the name of the second defendant. The first plaintiff alleged that the second and third plaintiffs asked the first defendant to buy the janma right to a moiety of the paramba and to restore the other half; that the first defendant refused and that the second and third plaintiffs thereupon sold the janma right to the first plaintiff, who now sued to redeem on payment of the otti money and poramkadam. The first and second defendants denied that the janma right had been offered for sale to the former and contended that the sale to the first plaintiff was invalid. The Civil Judge concurred with the District Munsif in disbelieving that the option to purchase had been given to the otti-holder, and, on the authority of *Special Appeal No.* 93 *of* 1859(b), affirmed the Munsif's decree dismissing the suit.

The first plaintiff now specially appealed on the ground that even if his title were bad as against the defendants, the second and third plaintiffs had a right to redeem the land.

Mayne for the appellant, the first plaintiff.

(a) Present Strange and Frere, J J.
(b) M. S. D. 1859, p. 159.

1863. March 21. S. A. No. 101 of 1862.

Tirumaláchániyár for the respondent, the second defendant, contended that the suit was premature.

PER CURIAM.—We think that an otti, like a kánam, mortgage cannot be redeemed before the lapse of twelve years from the date of its execution. An otti, in fact, only differs from a kánam in two respects. First, in the right of pre-emption which the otti-holder possesses in case the janmí wishes to sell the premises, and, secondly, in the amount secured, which is generally so large as practically to absorb in the payment of the interest, the rent that would otherwise have been paid to the janmí, who is thus entitled to a mere pepper-corn rent.

Appeal dismissed.

Original Jurisdiction (a)

Special Appeal No. 279 of 1862.

UKANDA VARRIYA'R..................*Appellant.*
RA'MEN NAMBU'DIRI....................*Respondent.*

When the úrálans of a devasvam were four tarawáds :—*Held* that a sale of the úráyáma right by one tarawád without the consent of the others was altogether invalid and that the vendee could not redeem a kánam mortgage of the devasvam land though the mortgagor was káranavan of the tarawád which assumed to sell the úráyáma right.

1863. March 21. S. A. No. 279 of 1862.

THIS was a special appeal from the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 116 and 117 of 1860. The plaintiff sued to redeem lands of the Karuvambalom devasvam, which lands had been demised on kánam by one Shangara Nambúdiri deceased, the káranavan of the third and fourth defendants to the káranavan of the first and second defendants. The third and fourth defendants' tarawád, subsequently sold the úráyáma right to the plaintiff. It appeared that there were four úrálans of the devasvam, the tarawád of the third and fourth defendants, and the tarawáds of the fifth, sixth and seventh defendants respectively, and the question was whether the plaintiff could redeem the kánam. The District Munsif held that he could, and decreed accordingly; but on appeal the Civil Judge recorded his decree, observing " There are in this case two points to be considered: First

(a) Present Strange and Frere, J J.

1863. March 21. S. A. No. 279 of 1862.

can the sale of the third and fourth defendants' úráyáma right to the plaintiff be recognized; secondly, if so, is the plaintiff in virtue of that sale entitled to sue alone for restoration of the lands demised by the late Shangara Nambúdiri ? As regards the first point the Court is of opinion that such a sale cannot be recognized. An úráyáma right is nothing but a right to manage the affairs of a devasvam, and it generally descends by inheritance as is the case here, and [in the present case] the right is not vested in one individual, but in four different tarawáḍs, all having a joint right to deal with the devasvam, but not to do so separately: in short it is a *corporation* to manage the affairs of the pagoda vested in certain families, and being so any one member thereof cannot sell what is not exclusively vested in himself. Therefore a sale of this nature is not only opposed to local usage, but is in the Court's opinion invalid.

" But on the hypothesis that the sale was legal there can be no doubt of the illegality of the plaintiff bringing this action alone for restoration. Admitting that Shangara Nambúdiri demised the lands in his executive capacity as úrálan, this does not vest him with the right to sue for redemption, this must be the act of the úrálans together; and this is clearly set down in the document A on which the suit is based—the meaning of this document has not struck the Munsif's attention............Being of opinion therefore that the plaintiff has no case, and as the record does not prove that the affairs of the devasvam were exclusively managed by Shangara Nambúdri, the plaintiff—even if the sale were upheld—has no right to sue without the others."

The plaintiff now appealed specially.

Mayne for the appellant, the plaintiff.

Kárunágara Manavan for the respondent the fifth defendant.

Per Curiam.—We concur with the Civil Judge in thinking that the sale of the úráyáma right by one tarawáḍ, without the consent of the others, was invalid. It follows that the vendee cannot redeem the káṇam even though the person who executed that káṇam was káraṇavan of the very tarawáḍ which assumed to sell the uráyáma right.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 19 of 1862.

AḶAGAIYA' TIRUCHITTAMBALA'............*Appellant.*
SA'MIṆA'DA' PIḶḶAI and others............*Respondents.*

The mirásidár is the real proprietor of mírási land, but ryots may be entitled to the perpetual occupancy of mírási land, subject to the payment of the mírásidár's share, but such tenure generally depends upon long-established usage and must be proved by satisfactory evidence.

Where the words of an agreement are plain and unambiguous they should not be explained away by extrinsic evidence, and still less by mere reasoning from probabilities.

1863. *March* 23.
R. A. No. 19 *of* 1862.

THIS was an appeal from the decision of G. T. Beauchamp, the Civil Judge of Tanjore, in Original Suit No. 5 of 1859. This suit was brought by the plaintiff as dharmakarttá of the Çrí Pañjanadíçvarasvámi pagoda at Tiruvaḍi to recover two-thirds of certain lákhiráj lands called Parittikkuḍi and Karuppúr in the ta'aluk of Tiruvaḍi with svámibogam and produce from the defendants, by virtue of an agreement in Tamil made in April 1831 between them and the Government then in charge of the pagoda property. The following translation of the agreement (marked A) was filed in the Civil Court.

"Taram muchalká (agreement) executed in April 1831, to the Honourable Company's sarkár, by us Subba Piḷḷai, Kuṭṭaiya Múppan,' Moṭṭé Muttu Múppan, Pachaiya Múppan, Sévaga Karappa Múppan and Ellaiya Peruma Múppan, 6 in all, the ulavadai káṇikkudi (ryots entitled to cultivation) of the sarvamániyam villages Parittikkuḍi and Karuppúr, attached to the pagoda of Çrí Pañjanadíçvara Svámi, at Tiruvaḍi in the ta'aluk of Tiruvaḍi, with our consent to the taram paisal (settlement) about the said villages.

" The following are the nañjey arable lands of the said villages, according to the survey in faṣlí 1238. Parittikkuḍi consists of 5 velis, 18 maus and 23¼ gulis of nañjey one-crop lands, and 6 velis, 1 mau and 34⅝ gulis of two-crops lands, in all 12 velis, 8 maus and 57⅝ gulis. Karuppúr consists of 5 velis, 18 maus and 31¼ gulis of nañjey one-crop lands, and 1 veli, 1 mau and 71$\frac{3}{16}$ gulis of two-crops lands, in all 7

(a) Present Scotland, C. J. and Holloway, J.

1868. March 23. R. A. No. 19 of 1862.

velis, and $4\frac{5}{16}$ guḷis of lands. In all, the two villages consist of 19 velis, 8 maus and $61\frac{1}{16}\frac{5}{16}$ guḷis of nañjey one-crop and two-crops lands. The puñjey lands of Parittikkuḍi are 14 maus, and $48\frac{3}{3}\frac{1}{8}$ guḷis, and those of Karuppúr are 3 maus and $84\frac{1}{8}\frac{7}{4}$ guḷis, amounting in all to 18 maus and $33\frac{1}{6}\frac{5}{4}$ guḷis. Total nañjey and puñjey lands are 20 velis, 6 maus and $95\frac{1}{8}\frac{1}{4}$ guḷis. The "kával varumánam" (watching-fee) payable thereon to the sarkár is rupees 29-3-4½ for Parittikkuḍi, and rupees 16-4-$1\frac{5}{16}$ for Karuppúr, amounting in all to rupees 45-7-$5\frac{1}{1}\frac{3}{7}$ for both the villages. We shall pay the said amount to the sarkár; and exclusive of the ryot's share, svatantram (perquisites), &c., we shall from faslí 1240 continue paying for ever to the said pagoda an annual svámibogam (rent) of 750 pons, being the value (at 3⅛ panams per kalam, the jamábandi price of the said mégáṇam) of 1,535 kalams of paddy for Parittikkuḍi, and 865 kalams for Karuppúr, in all 2,400 kalams of paddy for both the villages and also for the puñjey lands, 11 pons and 9 panams for Parittikkuḍi, and 3 pons and 1 panam for Karuppúr, in all 15 pons for the puñjey lands, making a total of 765 pons or rupees 1,190-0-0, for the nañjey and puñjey lands. We shall pay the sarkár kával varumánam (watching-fee), according to the terms fixed for the same. The following are the terms for the payment of the svámibogam (rent) to the pagoda, *viz.*, rupees 66-15-4 on the 5th November; rupees 133-14-8 on the 5th December; rupees 133-14-8 on the 5th January; rupees 85-8-0 on the 5th February; rupees 171-0-0 on the 5th March; rupees 256-8-0 on the 5th April; rupees 213-15-6 on the 5th May; and rupees 128-3-10 on the 5th June; in all 8 terms for the payment of the svámibogam (rent), rupees 1,190-0-0 to the pagoda. As we have thus agreed, we shall, so long as the said villages are in our possession, pay the sarkár kával varumánam (watching-fee) according to the terms fixed for the same, and the svámibogam (rent) to the pagoda according to the aforesaid terms, the portion for the kaḍappu and kar lands within the end of January, and the other portion for the sambá and pisánam within the end of June, and obtain receipts for the same. If in default thereof, there should be any arrears, they may be realized by attaching and selling at auction a proportionate portion of our estates. If garden-crops, such as betel, plantain-trees, sugar-cane, tobacco, onions, garlicks, &c., should be cultivated

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in the nañjey or puñjey lands of the said villages, in any year by means of irrigation, we shall submit to the sarkár a true account of the same for the year in which such cultivation may be held, and pay the revenue proportionate thereto. If we should cultivate any of the waste-lands of the said villages, we shall pay the revenue of those lands for the year in which they may be so cultivated. As to the supply of servants for the repair of the said villages, we shall act according to the customs that prevailed hitherto; and we shall ourselves conduct the kuḍimarammattu (repairs by ryots), &c., necessary for the said villages. As to the supply of servants to bear the "eḍupadi sámán" (things in frequent use) during the daily and annual festivals, and those called Pañchaparvam of the said pagoda, we shall carefully and without delay supply the servants, &c., as usual. If any loss should arise in any year in consequence of inundation or drought caused by Divine agency, the sarkár should inspect the same and make a reasonable remission as usual. If we should cultivate any táḷadi lands of the said villages in addition to those mentioned in this muchalká (agreement), we shall pay the táḷadi revenue proportionate to those lands. Thus is this taram muchalká (agreement) executed with our free will and consent to act up to the above terms. The svámibogam (rent) having been settled at 2,825 kalams of paddy according to the taram (sort), (we) the ryots contended, that the said amount could not be realized, and that we would not agree to the same; and thereupon it has been settled at 2,400 kalams of paddy per annum. If any body should hereafter put in darkhást (application), and offer more than the said amount, we shall either undertake to pay such (larger) amount if we chose to do so, or otherwise, give up the said lands to those who shall offer a larger amount. Thus is this taram muchalká (agreement) executed with our free will and consent.

(Signed) SUBBA PIḶḶAI,
(„) KUṬṬAIYA MU'PPAN,
Mark of MOṬṬE' MUTTU MU'PPAN.
„ SE'VAGA KARAPPA MU'PPAN.
„ PUCHAIYA MU'PPAN.
„ ELLAIYA PERUMA MU'PPAN.
(Signed) N. W. KINDERSLEY,
Civil Judge."

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A larger landlord's share having been offered, the defendants declined to pay the same, contending that they possessed an hereditary right to the perpetual tenure of the lands in dispute, and that the true construction of the agreement A was that the landlord's share alone was to be surrendered in case of failure to pay such larger sum as any third party might have agreed to pay. The Civil Judge held that the defendants possessed the hereditary right of occupancy which they set up, and that the agreement A could not mean that they should surrender such right. He decreed, however, the payment of the advanced rate from the season next after that in which it was first demanded.

The plaintiff now appealed against this decree for the following reasons amongst others.

" I. Because the document A is binding on the defendants and the Court below has placed a wrong construction upon it.

" II. Because, be the defendants what they may, and their tenure what it may, they have voluntarily contracted to give the plaintiff possession upon certain contingencies, which contingencies it is admitted have happened; that is to say, a higher rent has been offered and the defendants have declined to pay the same."

Norton for the appellant, the plaintiff.

Branson for the respondents, the first, second, fifth and seventh defendants.

The Court delivered the following

JUDGMENT:—This was a suit brought by the plaintiff, as trustee of a pagoda, to recover certain lands from the defendants, in virtue of an agreement made by them with Government when in charge of the pagoda property. The ground was that a larger sum as landlord's share had been offered by a third party, and that the defendants had refused to pay it.

The defendants did not deny that they had refused to pay a larger landlord's share, but contended that they possessed an hereditary right to the perpetual tenure of these lands,

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and that the true construction of the agreement sued upon was that the landlord's share alone was to be surrendered in case of failure to pay such larger sum as any third party might have agreed to pay.

The Civil Judge decided that the defendants possessed the hereditary right of perpetual cultivation for which they contended, and that the true meaning of the agreement could not be that the defendants should surrender such hereditary right. But he decreed the payment of the enhanced rate from the season subsequent to that in which it was first demanded.

It is indisputable that there is such a right of occupancy as that for which the defendants contend. The mírásídár being the real proprietor of the land, there are instances of the possession by ryots of a title to the perpetual occupancy of lands subject to the payment of the mírásídár's share, to be ascertained by reference to the class of land and the amount derivable from neighbouring lands of the same class. This tenure, however, depends for the most part upon long-established usage or custom and should be proved by satisfactory evidence. Where, too, it exists, the rights incident to it are well understood, and the mere existence, as in this case, of a special agreement defining the terms of the ryots' holding is in itself opposed to the title which the defendants in this case have asserted. The use of a particular term in revenue-accounts does not afford any very strong argument either on the one side or on the other. There is great laxity in the use of these revenue-terms, and it will be found that those employing them often attach no very definite ideas to them. We should, however, feel some difficulty, upon the evidence properly receivable in this case, apart from the terms of the special agreement in 1831, if it were necessary for the decision of the case precisely to determine the rights possessed by these defendants previously to the time when such agreement was entered into by them. But we think that effect must be given to that agreement, and that upon a proper construction of its terms the plaintiff is entitled to succeed. The execution of the agreement is admitted. It is not alleged that it was made in circumstances rendering it impeachable. On the contrary the contention of the defendants is merely that on its true construction the plaintiff is not entitled to the relief sought.

The true construction of the agreement depends upon the ordinary meaning of the words used, and if those words are plain and unambiguous, it is quite clear that they must not be explained away by extrinsic evidence, and still less by mere reasoning from probabilities. There is no duty of a court of justice more imperative than that of upholding contracts into which parties have voluntarily entered under no mistake of fact. The agreement recites that Government and the ryots being at issue as to the share payable by the ryots holding these lands, a certain rate had been fixed and that the ryots agreed to pay it for ever. The ryots further covenanted that in case of an additional sum being offered by any one else, they should have the option of paying that enhanced rate, or if they declined that they should surrender the lands to the offerer of the higher rate.

The argument that the only thing to be surrendered was the landlord's share is quite inconsistent with the stipulation that the lands are in case of refusal to be surrendered. It is manifest that if the result of their failure to pay the enhanced rent was merely to be a recurrence to an annual rent determinable by custom, very different language would have been employed. There can be no words more inappropriate to the expression of such a stipulation than those here used; while no words can be more appropriate to the expression of the meaning for which the plaintiff contends. In summing up the terms to which they had agreed, the ryots say that "so long as the villages shall remain in their possession," they will pay certain dues. These words plainly point to the contingency of cessation to be enjoyed and followed, as they are, by words distinctly specifying the circumstances on which that contingency shall arise, there can, we think, be no doubt that the true meaning of this agreement is, that on an enhanced rent being offered, and the ryots refusing to pay it, they are bound to surrender the lands to the person so offering. The decree of the Court will therefore be, in modification of that of the Court below, that the defendants surrender these lands to the plaintiff with rent at the rate decreed by the Civil Court.

We think that the defendants must also pay the costs of the appeal.

Appeal allowed.

Original Jurisdiction (a)

Ex parte HURST.

In the Matter of the British Steamship "*Jason.*"

The local tribunal in India appointed under sections 201 and 202 of Act I of 1859 can suspend or cancel the British certificate of a Master or Mate, and for that purpose its report need not be confirmed by the local Government.

1868. *March* 27.

ON the 27th December 1862 the British steam-ship "Jason," James Thomas Hurst, Master, was stranded and abandoned as a total wreck on the coast of India, about six miles to the north of Madras. Under the provisions of Act I of 1859 Messrs. T. G. Clarke and J. B. Crowther, were, on the 13th January 1863, appointed by the local Government of Madras to investigate the causes of the loss of the "Jason." They proceeded to hold their enquiry, and at the conclusion of the investigation made their report to the local Government, containing a statement of the case and of their opinion thereon. But no copy of that report, nor any statement of the case upon which the investigation was ordered, was furnished to Captain Hurst before the commencement of such investigation.

The proceedings in this investigation being for this and other reasons considered void, the local Government of Madras, by orders dated respectively the 10th and 14th February 1863, appointed Lieut.-Colonel W. J. Wilson (a police-magistrate) and Captain Martin of the "Isabella" to make a second enquiry into the circumstances connected with the loss of the "Jason", under the provisions not only of Act No. I of 1859, but also of the Merchant Shipping Act Amendment Act of 1862, (25 and 26 Vict. c. 63).

Lieut.-Colonel Wilson and Captain Martin accordingly held a second enquiry, and at the conclusion of the case, acting under section 23 clause 3 of the Amendment Act of 1862, stated in open court the decision to which they had come, and suspended Captain Hurst's certificate for one year. Such certificate had been granted under provisions of the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104).

(a) Present Scotland, C. J. and Bittleston, J.

Captain Hurst refused to give up his certificate, whereupon Lieut.-Colonel Wilson and Captain Martin directed him to pay a penalty of rupees 400, and in default to undergo three months' imprisonment. On his declining to pay the penalty Lieut.-Colonel Wilson issued a distress-warrant for the recovery of rupees 400 against his goods and effects; and on his refusal to enter into a recognizance to appear on the return-day of the warrant, he was, on the 4th of March, placed in custody of the police.

On the 11th of March 1863 *Branson*, upon an affidavit of Captain Hurst to the foregoing effect, obtained a rule *nisi* that a writ of certiorari should issue to Lieut.-Colonel Wilson and Captain Martin to remove into this Court the record and decision which they had come to at the conclusion of their investigation. The following are the grounds on which the rule was granted. First, because Lieut.-Colonel Wilson and Captain Martin had no jurisdiction to suspend the certificate of Captain Hurst or to require him to deliver it up. Secondly, because Act No. I of 1859, which is the only Act under which the local Government have authority to direct an inquiry into the cause of wreck on the coast of India, authorized them to enquire and report their opinion only. Thirdly, because if the authority to suspend a certificate under the Merchant Shipping Act Amendment Act of 1862 did in fact authorize and empower tribunals directed to enquire and report to the local Government under Act I of 1859 to suspend certificates and demand their delivery up for that purpose, that authority vested in Mr. Clarke and Captain Crowther on their appointment, and could only be exercised by them; and Fourthly, because Act I of 1859 was the only Act in force and applicable to cases of this kind in India.

The Advocate General (Smyth) now shewed cause against the rule.

Mayne on the same side. In order to support the proceedings of Lieut.-Colonel Wilson and Captain Martin it is necessary to show, first, that the original enquiry was so defective as to amount to a nullity, and secondly, that the final en-

1863. March 27. quiry was regular throughout. Enquiries into shipwrecks are provided for by Parts III and VIII of the Merchant Shipping Act 1854. Part VIII only applies where the ship is lost on or near the coasts of the United Kingdom, or where the witnesses arrive in the United Kingdom. Part III (see section 109) applies to all seagoing ships registered in the United Kingdom and their owners and masters wherever the same may be. To prevent any doubt upon this point section 109 provides that "if in any matter relating to any ship, or to any person belonging to any ship, there appears to be a conflict of laws, then if there is in the Third Part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision, and if there is no such provision the case shall be governed by the law of the place in which such ship is registered."

Under the Merchant Shipping Act of 1854, section 242, when a wreck took place in India, a report was to be made by a tribunal authorised by the legislature, upon which report, when confirmed by the Governor, the Board of Trade might suspend the certificate. Act I of 1859, sections 100—102 constituted such a tribunal, and so supplied the machinery required by the Merchant Shipping Act. The Merchant Shipping Amendment Act of 1862, section 23, took away the power of the Board of Trade, and directed the power of suspension to be exercised by the local tribunal. This Act is to be construed as part of the Merchant Shipping Act of 1854, and by their combined effect, the tribunal appointed under Act I of 1859, section 100, is given authority to suspend the certificate of a British Master. The enquiry conducted by Messrs. Clarke and Crowther was a mere nullity, Those gentlemen only professed to be acting under Act I of 1859. This Act merely authorised them (section 102) to report to the local Government. The local Government could make no use of their report. They could not suspend the certificate under section 82, for that section only applies to Indian certificates. Nor could they send on the report to the Board of Trade, for the Board would, under the Merchant Shipping Amendment Act, be unable to deal with it. Further, even if Messrs. Clarke and Crowther had professed to act under the Merchant Shipping Act of 1854 and 1862

their proceedings were wholly void, as they had neither sent to Captain Hurst before the investigation a copy of the report upon which that investigation was founded, as directed by the Merchant Shipping Act of 1862, section 23, clause 6, now had they announced their decision to him at the close of the enquiry as directed by clause 3 of the same section. This being so, their proceedings could be no bar to a subsequent enquiry. On the analogy of a plea of auterfois convict, it would be necessary to show that Captain Hurst could have been injuriously affected by their report, but it is evident that no result whatever could have followed from it. On the other hand Colonel Wilson and Captain Martin were both authorised,, and professed to proceed under the three Acts of 1854, 1859 and 1862, and had strictly complied with all the formalities required by the last statute.

Branson, in support of his rule. First. The first question is whether the Merchant Shipping Act of 1854 applies. Section 288 contemplates the application of that Act to India. Act I of 1859 does not apply. Part III legislates independently.

Secondly. If the Act of 1854 applies and Part III, the Act of 1862 section 23, clause 6, requires the concurrence of the assessor on the report, that is, the report on which investigation is ordered.

[SCOTLAND, C. J. :—No—that is impossible.]

Thirdly. The Acts of 1854 and 1862 must be read together. The Board of Trade could only punish after confirmation, therefore the report of the local tribunal must be confirmed by Government before such tribunal can suspend or cancel certificates.

Fourthly. The investigation first held was final. No one can be tried twice for the same matter. When once appointed the law authorised the Commissioners to act in all respects.

The Advocate General in reply.

SCOTLAND, C. J. :—The question in this case is as to the construction of enactments contained in two Statutes and in an Act of the Legislative Council: and having had the

1868. March 27. opportunity of hearing the arguments on both sides, and of looking at those enactments, I must say that I entertain no doubt whatever as to how they should be construed.

The question arises on a rule *nisi* calling on Lieut.-Colonel Wilson and Captain Martin to shew cause against a certiorari issuing, on the following grounds: first, because they had no jurisdiction to suspend Captain Hurst's certificate or to require him to deliver up the same: secondly, because their power was confined to reporting the result of their enquiry to the local Government; and, thirdly, because *if* the authority to suspend the certificate under the Act of 1862 empowered the local tribunals mentioned in the Indian Act of 1859 to suspend certificates, that authority vested in Messrs. Clarke and Crowther, and they alone could exercise it.

The Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104) contains a code of law applicable to Merchant Ships and Seamen, and divided into eleven parts. Of these we are only concerned with Parts III and VIII. Part III, no doubt, relates to Masters and Seamen; but it is plain, we think, that the provisions contained in that part are in general not intended to be put into operation in cases of wreck or loss at sea; and such of them as relate to the money of seamen, their wages, discipline, and crimes committed on the High Seas and abroad are all clearly consistent with and contemplate the existence of the ship. The words used in section 241 are, however, large enough to include cases where a Captain is charged with incompetency or misconduct by reason of the loss of his ship; and if there were no other provisions in the Act I should doubtless hold that they did include such cases. But Part VIII expressly refers to wrecks, and casualties on or near the coasts of the United Kingdom, or elsewhere, when competent witnesses arrive or are found at any place in the United Kingdom.

That being the general view I take of the Act, there is then this enactment in section 288: "If the Governor General in India in Council or the respective legislative authorities in any British possession abroad by any acts, ordinances or other appropriate legal means, apply or adopt any of the provisions in the Third Part of this Act contained to any British ships registered at, trading with, or being at any

place within their respective jurisdictions, and to owners, masters, mates, and crews thereof, such provisions, adapted as aforesaid, shall in respect of the ships and persons to which the same are applied be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted throughout Her Majesty's dominions, in the same manner as if such provisions had been thereby so adapted and applied, and such penalties and punishments had been hereby expressly imposed." That section clearly refers to Part III and to Part III only. Turning then to the Indian Act I of 1859, we find that its provisions, from sections 1 to 99 inclusive, are with one or two exceptions in accordance with the enactments contained in Part III of the Merchant Shipping Act of 1854, and carry out the adaptation or application contemplated in the 288th section of that Statute. Mr. Branson had therefore no ground for stating that the Indian Legislative Council has not adopted Part III of the English Statute.

1863. *March* 27.

Now as to section 242 of the Act of 1854. That provides that *the Board of Trade* may suspend or cancel the certificate of any master or mate in the cases therein enumerated, the fifth of which is: "If upon any investigation made by any court or tribunal authorised, or *hereafter to be authorised by the legislative authority in any British possession* to make enquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness or tyranny, or that the loss or abandonment of, or serious damages to any ship, or loss of life, has been caused by his wrongful act or default, *and such report is confirmed by the Governor* or person administering the government *of such possession*."

According to that provision, which exists solely by virtue of Imperial legislation, it is only the Board of Trade that is invested with power to suspend or cancel certificates; not only, it is to be observed, when the enquiry has occurred in the United Kingdom, but also when it has taken place in any British possession.

Turning now to the Indian Act No. I of 1859, we find sections 100, 101, 102 making provision for an inquiry, an

1863. March 27. investigation and a report in four cases of wreck and casualty: first, whenever any ship is lost, abandoned or materially damaged on or near the coast of India; second, whenever any ship causes loss or material damage to any other ship on or near such coast; third, whenever, by reason of any casualty happening to or on board of any ship on or near such coasts, loss of life ensues. These three cases are not confined to ships registered in India. The fourth case is whenever any such loss, abandonment, damage or casualty happens to or on board any ship *registered at any port or place in India,* under the Merchant Shipping Act 1854 or under Act X of 1841. The Act then goes on to provide for the giving notice to the local Government of the loss, abandonment, damage or casualty; and then enacts that it shall be lawful for such Government, if a formal investigation appears to it to be requisite or expedient, to appoint two persons to make the same, one of whom shall be a Magistrate acting in or near the place where the investigation is held; the other may be any person conversant with maritime affairs. The persons appointed are then to proceed to make the investigation, and upon the conclusion of the case are to send a report to the local Government, containing a full statement of the case and of their opinion thereon. With this report the provisions as to enquiries into wrecks conclude. From these sections, if read in connection with section 242 of the Merchant Shipping Act of 1854, it appears that before the passing of the late Amendment Act, the machinery for enquiry into cases of wreck and for the suspension or cancellation of the certificate of incompetent masters, was both complete and clear.

Then came the Merchant Shipping Act Amendment Act 1862, 25 and 26 Vict. c. 63. The first important provision is the first section, which provides that the Act shall be "construed with and as part of the Merchant Shipping Act of 1854," which is termed the Principal Act. The provision to which I am about to refer must accordingly be read as if inserted in that Act. Then the 23rd section provides for a new state of things with reference to the cancellation and suspension of certificates. The first clause runs thus: "The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the Principal Act conferred

on the Board of Trade shall (except in the case provided for in the fourth paragraph of the said section) vest in and be exercised by the local Marine Board, Magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried, *and shall not in future vest in or be exercised by the Board of Trade.*" 1863. *March* 27.

No words could be used to express more clearly the intention of the legislature to put an end to the power of the Board of Trade to cancel or suspend certificates, (except when the master or mate is shown to have been convicted of any offence,) and to transfer such power to the Court or tribunal by which the investigation is made. The terms of the third clause support this conclusion. That clause provides that " Every such board, court or tribunal shall at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence, to Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their. report." And section empowers the tribunal to inflict a penalty, as has been done in this case, if the master do not upon demand of such tribunal deliver his certificate to them.

It may be remarked, in passing, that persons subjected to inquiry before such tribunals are, notwithstanding these alterations, by no means deprived of any benefits or advantages possessed by them under the former law—for a power is subsequently given to the Board of Trade to overrule or modify the decision of the local Court, if they think the justice of the case require it.

It is also provided by the sixth clause that " no certificate shall be cancelled or suspended under this section, unless a copy of the report, or a statement of the case upon which the investigation is ordered, has been furnished to the owner of the certificate before the commencement of the investigation, nor in the case of investigation conducted by justices or stipendiary magistrates, unless one assessor at least expresses his concurrence in the report."

1863. March 27. It seems to me clear that, if I were considering this question in England, there could be no doubt whatever that the Principal Act is repealed by this section, so far as regards the power of the Board of Trade in the first instance to suspend or cancel certificates; and that for such purpose a local Court or tribunal of enquiry is substituted for the Board of Trade. Why should not the same effect be given to that section in India? Section 242 of the former Act as to British registered ships applies to such ships of its own operation, and is not left to be applied to India by Indian legislation. And reading the Act of 1862 as I have said, it must be read as part of the Act of 1854: the repeal-provision contained in the Act of 1862 must be taken to be a repeal in India as well as in England; and the provisions in section 23 are in full operation here. Therefore, although at first there seemed some doubt, my mind is satisfied that the tribunal here was entitled to demand the delivery up of Captain Hurst's certificate, and that in the event of that demand not being complied with, the powers given by the 24th section of the Amendment Act might be enforced.

There is no ground, I think, for the point put by Mr. Branson, that the report of the local tribunal must be confirmed by the local Government before such tribunal can suspend or cancel certificates. The provision requiring confirmation by Government is contained in the Imperial Statute, but is not to be found in the Indian Act.

Then it was contended that because of the former enquiry Government was *functus officio*. There was nothing in the case to bring it within the rule that a man shall not be twice vexed for one and the same cause. There is no ground for saying that Captain Hurst was ever before vexed in respect of the suspension of his certificate, or the consequences of his refusal to give it up. The circumstance that the Government on the first occasion did not expressly confer upon the former Commissioners the powers of the Acts of 1854 and 1862, with regard to suspending certificates, does not alter the case. Such powers would vest in the Commissioners on the passing of the order directing the enquiry. The mere fact of the Government directing them to report, without saying, you may go on and cancel the certificate if necessary, would not prevent the objection from being taken

and succeeding if it were well founded. But here the former Commissioners could not have exercised that power. For it is expressly provided by the Act of 1862, section 23 clause 6, that no certificate shall be cancelled or suspended under that section unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation. Here no such report or statement was furnished to Captain Hurst by the former Commissioners, and they could not therefore have cancelled or suspended his certificate. They were never charged by law with the necessary functions, and never even purported to exercise them. The first was not a proper enquiry. The second Commissioners for the first time exercised the powers conferred by law on the local tribunal appointed for such an investigation, and their proceedings were regular and cannot be disturbed. Captain Hurst therefore was never before on his trial, or in peril upon the same matters, nor is he prejudiced in any way; and the objection based on the institution of the former inquiry falls to the ground. The rule must therefore be discharged.

BITTLESTON, J.:—This appears to be a plain case' Looking at the Acts it seems to me that the power of cancelling or suspending the certificates of masters of British registered ships is matter of imperial legislation. The Indian legislature has not interfered with this at all. What they have touched is the power of suspending Indian certificates granted under Act I of 1859. So far as this case is concerned, the Indian legislature has merely constituted a tribunal to enquire into cases of wreck or casualty on the coast of India.

The first question is whether section 23 of the Amendment Act of 1862 applies? That Act is to be construed as part of the Act of 1854, and if section 242 of the latter Act applies, it is clear, I think, that section 23 of the Amendment Act applies also. Then does section 242 apply? It clearly does, except in so far as the provision in clause 5 of that section as to confirmation is in effect repealed by section 23 of the Amendment Act.

Section 242 of the principal Act provides that the Board of Trade may suspend or cancel certificates in several in-

1863. March 27. stances the fifth of which is [His lordship here read clause 5.] Then has there been here an enquiry by a legally authorised tribunal? To answer that we must turn to Act I of 1859. Sections 100, 101, 102 provide for such an enquiry. If such a tribunal has been constituted by the Indian legislature, and if there has been an investigation by such tribunal, then, under the principal Act, if that tribunal has made its report, and that report has been confirmed by the Government, the Board of Trade were to act. Would that provision have been applicable to this case if the Act of 1862 had not been passed? It seems to me clear that it certainly would; and if so it seems equally clear that the Act of 1862 has taken away the power of cancelling or suspending certificates from the Board of Trade and vested it in the local tribunal. Then has that local tribunal, as constituted under the second commission, legally exercised the powers given to it? It is said that it has not, because it was bound, as alleged, to wait for the confirmation by Government before suspending the certificate. And in support of such allegation it was contended that the words in the principal Act requiring such confirmation are still in force. But reading section 23 of the Act of 1862, it is impossible to hold that the local tribunal is to wait for confirmation by any other authority. That section in effect, though not in words, repeals the provision in the fifth clause of section 242 of the principal Act with reference to the confirmation by Government.

Then as to the alleged exhaustion of the power of Government by ordering the first commission. It seems to me that the maxim *Nemo debet bis vexari* cannot apply to a case like this, when the second enquiry was only instituted when it appeared that the first was wholly futile and fruitless. Captain Hurst was never in any peril under the first enquiry and therefore there was no objection to the appointment of the second commission. The rule must accordingly be discharged.

The Advocate General asked for costs.

Branson contra. This is a case of the first impression.

SCOTLAND, C. J.:—The usual result must follow.

Rule discharged with costs.

Original Jurisdiction (a)

GHULA'M MUHAMMAD NAIAMUT KHA'N *against* DALE and another.

By Muhammadan law *semble* the dominion of the sovran is equally absolute and uncontrolled over all his possessions of every kind.

But *quaere* whether all his possessions are necessarily subject to the ordinary rules of inheritance and partition among descendants.

A reigning Muhammadan prince may possess property held *jure coronae* as well as property acquired by some other title.

1863. *February* 24, *March* 27.

THIS was a special case raising questions respecting the validity and extent of gifts made in 1845 by the last Nawáb of the Carnatic to the plaintiff, (the dároghah of his kitchen) of a garden called 'Alí Bágh situate near Arcot and a garden called Amír Bágh and certain other lands situate at Oraiyúr near Trichinopoly, which questions it was agreed should be adjudicated upon by the High Court, provided the Court should be of opinion that the premises were not public or state property, but the private and personal property of the Nawáb in his private capacity.

So far as it is necessary to state them, the facts agreed upon for the purposes of the special case were these. The Nawábs of the Carnatic were independent sovereign Princes in alliance with the British Government. They had palaces at Trichinopoly and Arcot and *bághs* or gardens attached thereto, including the two gardens and lands the subject of this litigation. At the time of signing the treaty of 1781, these were part of Wálájáh the then Nawáb's territorial possessions, and were not included in the exceptions contained in article 3 of the treaty of 12th July 1792. They were, however, included in the districts mentioned in schedule No. 2 to the same treaty, the management of which districts the Company was to assume in case the Nawáb's share should not be paid at the times therein specified. Nawáb Wálájáh died on the 13th October 1795, and was succeeded by his son, Umdut ul-Umra, who died on the 15th July 1801—when, on discovery of correspondence of the Nawábs Wálájáh and Umdut with Haidar and Tipu, the East India Company seized all the Na-

(a) Present Scotland, C. J. and Bittleston, J.

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wáb's possessions, including the gardens and lands in question. Umdut ul-Umra's eldest son, 'Alí Husain, was not allowed to succeed him: but, on the 31st July 1801, a treaty was entered into by the East India Company with A'zím ud-Daula, nephew of Umdut ul-Umra, under which he became the Nawáb of the Carnatic. In June 1802, the gardens and lands were, at the desire of the Nawáb Azím ud-Daula, restored to him by the Government of Madras, and from that time have descended in succession to his successors. On the restoration of the premises, the Nawáb appointed officers to manage them, who forwarded their accounts to his Díwán-i-mahál (Revenue Board). The collections from these gardens were inserted as "revenues" in the accounts of the Díwán-i-mahál from 1802 to 1845-6. From that time no entries appear in such books, save one of rupee 1-10 for 26 cocoanut trees sold in 1855-6, but the rents or revenues were remitted to the Díwán of the Carnatic Darbár at Madras. On the 3rd August 1819, A'zím ud-Daula (the nephew) died, and was succeeded by his eldest son A'zím Jáh, who died on the 13th November 1825, and was succeeded by his son, Ghulám Muḥammad Ghaus, the last Nawáb. A'zím ud-Daula left five widows, six sons and four daughters, but the gardens and lands descended to his eldest son and successor. A'zím Jáh left two widows, one son and two daughters, but again the property descended to his son and successor. The 26th and 27th paragraphs of the case were as follows:—

"26. The Nawábs of the Carnatic kept the accounts and affairs of the State perfectly distinct from their private and personal transactions. Separate and distinct kachhahrís or departments were kept in respect of each. The kachhahrís for conducting the accounts and affairs of the State were called "the Darbár," "the State" or "the Sarkár" kachhahrís, and were from fifteen to twenty in number, while that for conducting his own private or personal affairs was called "the Jéb-i-khás department." Sums were transferred monthly to the Jéb-i-khás from other departments for the private and personal purposes of the Nawáb; and although the servants of the Jéb-i-khás were all (equally with those of the departments) Sarkár servants, yet the Darbár or State departments never took cognizance of the expenditure

of any sum transferred to the Jéb-i-khás; while, on the other hand, the whole of the other departments were all under the general control of the Díwán of the Darbár, and the entries in the accounts of the Darbár kachhahrís were confined exclusively to Sarkár matters." 1868. *February* 24, *March* 27.

"27. The daftars of the Díwán-i-mahal, as also those of the Diwán of the Carnatic Darbár referred to in this case were "Darbár," "State" or "Sarkár" accounts, and were in no way connected with the Jéb-i-khás departments. No entry in respect of the rents or revenues of the gardens and lands in dispute was ever made in the daftars of the Jéb-i-khás department."

The Nawáb died on the 7th October 1855, and on the 21st September 1858 the first defendant, Mr. Dale, was appointed the Receiver of the Carnatic property under Act XXX of 1858.

Branson (*Arthur Branson* with him) for the plaintiff.

The Advocate General, Norton and *Mayne* for the defendants, the Receiver of Carnatic property and the Secretary of State in Council for India.

The Court took time to consider, and on the 27th March the following judgment was delivered by

BITTLESTON, J.:—The first question which we are called upon to answer in this case is, whether the gardens in question or any of them were public or state property of the Nawábs of the Carnatic since the year 1800, or their private property.

This, it seems to us, is a question of fact, in disposing of which we cannot derive any assistance from the consideration, presented by Mr. Branson, that the Muhammadan Law recognizes no distinction between the private and state property of the Sovereign.

If by this he meant that the dominion of the Sovereign is equally absolute and uncontrolled over all his possessions of every kind, the proposition is probably correct.

The absolute sovereignty of the Prince, would doubtless in the view of a Muhammadan lawyer, carry with it the idea of the superiority of the Prince to all law, the Prince himself being a living law, as it was expressed in the Roman Law Nov. 105) "*Omnibus imperatoris excipiatur fortuna, cui*

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et ipsas leges Deus subjecit, legem animatam eum mittens hominibus." Indeed, the right of the Sovereign to alienate the hereditary possessions of the Crown was formerly recognized by the law of England and freely acted upon by English Sovereigns(*a*).

But if it be meant that all the possessions of a Sovereign Prince—his gardens and palaces, his state-jewels, his jewelled throne and all the appanages of his royalty—are, according to Muḥammadan law, necessarily subject to the ordinary rules of that law with regard to inheritance and partition among his descendants, it would require very high authority and many well established precedents to support the proposition. Hówever, be the right of the Prince over the property which he holds, however acquired, ever so absolute, it is clear that in the case of any Sovereign Prince there may be in his possession certain property which he holds as the reigning prince "jure coronae," and other property which he has acquired by some other title, and from the statements in the case as well as the recital in Act XXX of 1858, it appears that the Nawábs of the Carnatic had property of the nature of state or public property as distinguished from private property.

The only question in this case is, whether in fact the property claimed by the plaintiff was of the former or the latter kind. Now it appears that the gardens in question were attached to the palaces of the Nawábs and were kept and retained under the immediate enjoyment of the Nawábs themselves; that on the death of the Nawáb, Umdut ul-Umra, the East India Company took possession of these gardens with the other possessions and property of the said Nawáb;—that the course of succession was then altered, and that instead of the son of Umdut ul-Umra, his nephew A'zím ud-Daula was placed on the masnad by the East India Company under the provisions of the treaty of 1801. It further appears that in the following year, the said gardens were restored by the Government of Madras to the Nawáb, A'zím ud-Daula, from whom they have descended in succession to his successors.

It appears to us difficult to conceive any circumstances stronger than this, to show that the possession of the gar-

(*a*) Before 1 Ann. stat. I. c. 7.

dens by A'zím ud-Daula, and his successors has been a possession and enjoyment incident to, and connected with the sovereignty of the Carnatic, and not a possession by them as private persons. Accordingly we find that though the Nawáb A'zím ud-Daula left widows, sons and daughters, and his successor A'zím Jáh left widows and daughters as well as one son, yet no division of this property took place on either occasion amongst the surviving relations, but the whole descended to the successor.

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It was observed by Mr. Branson that the other relatives may have received an equivalent for their shares; but there is no statement to that effect in the case; and we cannot infer that it was so.

The mode of making the accounts and of making the entries therein respecting these gardens set forth in the case is altogether favourable to the same view. We refer to paragraphs 26 and 27 of the case, which state, that the Nawábs kept the accounts and affairs of the State property distinct from their private or personal transactions. That the kachharís or departments for the former were called the Darbár, the State, or the Sarkár kachharís; while that for the other was called the Jéb-i-khás department, the two being quite distinct, and the former being entirely under the control of the Díwán of the Darbár: and that the entries relating to the gardens in question were made in the daftars of the Díwán-i-mahál belonging to the former, and not in the daftars of the Jéb-i-khás. We are unable, therefore, to come to any other conclusion than that the property in question was public or state property, and not the private or personal property of the Nawáb. This property is now with the consent of Government in the hands of the Receiver appointed under Act XXX of 1858. But his taking possession under the authority of Government being asserted as an act of state, and the submission of Government to our jurisdiction being expressly limited to the event of our being of opinion, that the property in question was not public or state property, but the private or personal property of the late Nawáb in his private capacity—we are precluded from further entertaining the case or expressing any opinion on the other questions raised thereby.

NOTE.—See *Adv. Gen. of Bombay* v. *Amerchund* (cited in a note to *Elphinstone* v. *Bedreechund* 1 Knapp 329.

Original Jurisdiction (a)

Original Suit No. 9 of 1862.

SUBBARA'YA MUDALI and others *against* THE GOVERNMENT and CUNLIFFE.

In suits brought against the Government, *eo nomine*, under the Code of Civil Procedure, the local Government must be considered as the party sued.

Semble the jurisdiction to entertain suits against the Government under sec. 5 of Act VIII of 1859 exists only where the cause of action arose.

Under clause 12 of the Letters Patent constituting the High Court of Madras the Government must be considered as carrying on business at the place where its members exercise all the functions of Government.

The words "carry on business" in that clause imply a personal and regular attendance to business within the local limits.

A suit will not lie in the High Court against the Collector of Madras residing and carrying on business at Sydapet, in respect of matters arising in Chingleput, though his Deputy-Collector carried on business within the local limits, and the orders and proceedings in reference to the matters in question were in his name of office as Collector of Madras.

1863. *March* 6, 11, *and* 27.

O. S. No. 9 *of* 1862.

THE plaintiffs claimed, first, payment of rupees 10,000 on account of injury done to them by the defendants in preventing the removal by the plaintiffs of certain wood in May and June 1862, and, secondly, an injunction restraining the defendants from further interfering with the plaintiffs in the felling and removing by them of wood in the grámas of Sátiyavédu and Kottamári Kuppam under their sale-contract with the ijárádárs Kumarasva'mi Reḍḍi, Tamli Cheṭṭi, Vírasvámi Reḍḍi, Yanáta Reḍḍi and K. Rámasvámi Reḍḍi, dated the 22nd February 1862.

It appeared that on the 25th January 1862, the Government of Fort Saint George, through the defendant Brooke Cunliffe, the Collector of Madras, sold to Kumarasvámi Cheṭṭi and others, as maṇiyagáras or head-men of the villages of Sátiyavédu, Chinna Yettivákam and Kottamári Kuppam in the Nagalapuram division, Tiruvalúr ta'aluk, and the district of Madras, the exclusive right for three years to cut wood in the jungles appertaining respectively to those villages, subject to a condition that they would not root out any of the trees, but fell them at one span above the surface of the earth, and should cut trees whose thickness exceeded that of the little finger, leaving those below that dimension undisturbed.

On the 6th February 1862 Mr. Cunliffe, the Collector of Madras, addressed the following tákíd to the tahsíldár of Tiruvalúr: "With reference to your 'arzi No. 431 of 13th September 1861, you are informed that Kodundarámaiyar having applied for the rent of the jungle of Sátyavédu, Kottamári Kuppam and Chinna Yettivákam for three faṣlís at the rate of 150 rupees per faṣlí, it was put up to competition during the annual settlement of this year when the paṭṭás were being distributed, in the presence of the darkhástdár and of the paṭṭá-maṇiyagáras and ryots of each village, when the said paṭṭá-maṇiyagáras and ryots made the highest bid for rupees 300, and agreed in my presence to have the rent at that rate for ten faṣlís from the current year. You are therefore required to divide the above beríj according to the extent of the jungle in each village, to obtain muchalkás and security-bonds from the paṭṭá-maṇiyagáras and ryots of each village, and to forward them with a report. Orders will then be sent for putting the jungle into their possession.

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(Signed) B. CUNLIFFE,
Collector."

On the 19th February 1862 the following karárnáma was executed by the maṇiyagáras:

"*To Her Majesty's Government of India,*
Madras District, Tiruvalúr Ta'aluḳ.

The karárnáma executed by Kumarasvámi Reḍḍi and Tambu Cheṭṭi maṇiyagár of Sátyavédu No. 1, Vírasvámi Reḍḍi, maṇiyagár of Kottamári Kuppam No. 71, and Vírappa Cheṭṭi, maṇiyagár of Chinna Yettivákam No. 50.

We having applied for a rent of the jungle within the limits of the above villages for the purpose of felling wood therein for three faṣlís from 1271 to the end of 1273 for 900 rupees at the rate of rupees 300 per faṣlí, our application was accepted, and we were directed to enter into certain conditions for felling wood: We accordingly hereby agree that for the preservation of the jungle we shall not root out any of the trees, but fell them at one span above the surface of the earth, and shall cut trees whose thickness exceeds that of the little finger, leaving those below that dimension undisturbed. We further agree that if, contrary to the above

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conditions we fell trees to the level of the ground, and dig out roots, and if it appears in the enquiry that we have been preventing the growth of the jungle, our paṭṭá lands as particularized below may be attached, sold and the loss recovered by the Sarkár from the proceeds.

[Here followed particulars of lands, the date, and the signatures of the maṇiyagárs, two witnesses and Mr. Cunliffe.]

On the 22nd February 1862 the maṇiyagárs who had executed this karárnáma sold their interest under their contract with Mr. Cunliffe to the plaintiffs, who forthwith proceeded to fell and remove the timber in the village-jungles. The sale was alleged to have taken place without the knowledge of the villagers, and they, considering themselves aggrieved, applied to Mr. Cunliffe, to stop the removal of the timber. Mr. Cunliffe thereupon issued an order that all parties should desist from cutting wood in the said jungles until the conflicting claims of the plaintiffs and of the villagers should have been decided.

The following issues were settled by Bittleston, J.

" First. The plaintiffs affirm and the defendants deny that the defendants did at the time of the commencement of this suit respectively dwell or carry on business or personally work for gain within the local limits of the Ordinary Original Jurisdiction of this Court within the meaning of the Letters Patent constituting this Court and that by reason thereof this Court has jurisdiction to receive, try and determine this suit.

The first issue therefore is whether the Government and the said Brooke Cunliffe, or either of them, did, at the time of the commencement of this suit, dwell or carry on business, or personally work for gain, within the said local limits within the meaning of the said Letters Patent.

Secondly. The plaintiffs affirm, and the defendants deny, that on or about the 25th January 1862 the Government through Brooke Cunliffe, Esq., sold to Kumarasvámi Reḍḍi, Tomli Cheṭṭi, Vírasvámi Reḍḍi, Málalá Yanáta Reḍḍi and C. Rámasvámi Reḍḍi the exclusive right for three years to cut wood in the jungles of the villages Sátyavédu and Kottamárikúppam named in the plaint, subject to a certain con-

dition as to the manner of cutting the trees, and that the said right was on or about the 22nd February 1862 sold and transferred by the said purchasers to the plaintiffs.

The defendants admit that the right to cut wood in the said jungles for three years was on or about the 25th January 1862 sold by the Government through the said Brooke Cunliffe to the said Komarasvámi Reḍḍi, Tamli Cheṭṭi, Vírasvámi Reḍḍi, Málalá Yanáta Reḍḍi and C. Rámasvámi Reḍḍi; but the defendants affirm and the plaintiffs deny that the said right was sold to them only as headmen of the said villages and not exclusively for themselves, but for and on behalf of the whole of the villagers of the said villages, and that the said Komarasvámi Reḍḍi, Tamli Cheṭṭi, Vírasvámi Reḍḍi, Málalá Yanáta Reḍḍi and C. Rámasvámi Reḍḍi under the said sale had no right which they could without the concurrence or knowledge of the said villagers assign or transfer to the plaintiffs.

The second issue therefore is whether the exclusive right to cut wood in the said jungles was sold by the defendants to the said Komarasvámi Reḍḍi, Tamli Cheṭṭi, Vírasvami Reḍḍi, Málalá Yanáta Reḍḍi and C. Rámasvámi Reḍḍi, and whether the same right was sold and transferred by them to the plaintiffs so as to confer a valid title on the plaintiffs as by the plaintiffs alleged.

Thirdly. The defendants affirm and the plaintiffs deny, that the said Brooke Cunliffe in issuing his order that all parties should desist from cutting wood in the said jungles until the conflicting claims of the plaintiffs and of the villagers of the said villages should be decided and in thereby preventing the plaintiffs from cutting and removing the said wood was acting judicially in his capacity as Collector and Magistrate of the district and that the said order was issued by him in the discharge of his judicial duty, and that he at the same time issuing the said order in good faith believed himself to have jurisdiction to issue the same.

The third issue therefore is whether within the meaning of Act XVIII of 1850, the Act complained of by the plaintiffs was ordered to be done by the said Brooke Cunliffe acting judicially and in the discharge of his judicial duty as

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Magistrate or Collector, he at the time in good faith believing himself to have jurisdiction to order the said act to be done."

With regard to the first issue the following points were proved. Mr. Cunliffe was the Collector of Madras: but he lived and personally carried on the business arising from the district of Chingleput at Sydapet, which is not within the local limits of the High Court's ordinary original jurisdiction; and he was a Magistrate only within the Chingleput district. Before April 1860 the Collectorate of Madras was conterminous with the local limits of the jurisdiction of the late Supreme Court, and the Collector carried on all his business at the office on the Mount Road within the same limits. In April 1860 the collectorate of Chingleput was annexed to that of Madras, and has ever since been administered by the Collector of Madras, but the collectorate business of Madras and that of Chingleput have been kept distinct and carried on in different offices. A deputy-collector resided within the limits of the former collectorate of Madras and, subject to Mr. Cunliffe, personally conducted at the office on the Mount Road all the business formerly transacted by the Collector of Madras. Mr. Cunliffe never personally attended at that office for the transaction of business, and disposed of all appeals and references from the deputy-collector at the office at Sydapet.

Branson (*Arthur Branson* with him) for the plaintiffs.

The Advocate General and *Norton* for the defendants.

The Court took time to consider, and on the 27th March the following judgment was delivered by

SCOTLAND, C. J.:—In this case we were called upon to consider and decide two questions of jurisdiction involving the construction of the twelfth clause of the Letters Patent, by which the jurisdiction of this Court, in all cases other than suits for land or immoveable property, is made to depend upon the cause of action having arisen, or the defendant at the time of the commencement of the suit dwelling or carrying on business or personally working for gain, within the local limits of the Court's ordinary original jurisdiction.

There is a difference in this respect in the Code of Civil Procedure; by section 5 of which the jurisdiction of the Civil Courts throughout the country is made to depend upon the cause of action having arisen, or the defendant at the commencement of the suit dwelling or personally working for gain, within the local limits of the particular jurisdiction.

In this case it is admitted that the cause of action did not arise, and it is proved that the defendant, Mr. Cunliffe, does not dwell, within the local limits of the High Court's jurisdiction; and as regards the Government, we think the term 'dwell' cannot be considered applicable, or at all events, that no distinction can be made between dwelling and carrying on business; for if the Government can be said to dwell any where, it must be in the place where the business of Government is carried on. And so in this case, the question is brought to the point whether either of the defendants, the Government, or Mr. Cunliffe, can be said to carry on business within the local limits of the High Court, according to the proper construction of the twelfth clause of the Letters Patent?

As regards the Government; assuming the local Government to be meant, we are of opinion that the Government must be considered as carrying on its business at the place where the members of the governing body meet and deliberate upon the affairs of Government, and as such, decide upon and issue their authoritative orders. Under the charter of the late Supreme Court suits against Government were instituted against the East India Company, and, since the passing of the 21 & 22 Vict. chap. 106, against the Secretary of State in Council. But in the Civil Procedure Code, by which the procedure in the High Court is now governed, suits against the Government are provided for, and no distinction is pointed out, between the Supreme Government at Calcutta or the Secretary of State in Council, and the Government of each Presidency. But having referred to the Regulations in force prior to the Civil Code as respects suits against Government and its officers in the Civil Courts of the Mofussil, we think that in suits brought against the Government, *eo nomine*, under the provisions of the Code, the local Government must be considered as the party sued; and having reference to section 5 which does not contain the

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word "carrying on business," we may observe that the jurisdiction to entertain suits against the Government as such under that section alone would, it seems to us, exist only where the cause of action arose.

In the Letters Patent, however, the additional words "carrying on business" can, we think, reasonably be applied to the Government as a deliberative body, and to the locality where its members meet and exercise all the functions of Government; similar words are to be found in the County Courts' Act 9 & 10 Vict. chap. 95, and the cases in which a construction has been put upon them by judicial decisions in England, in regard to their application to an incorporated Company, bear a strong analogy to the present case.

In a late case of *Shiel* v. *The Great Southern Railway Company(a)* in which the previous authorities are referred to, it was decided that the incorporated Company carried on business not in every place where it had officers, but only at the place where its principal office was, and where the affairs of the Company were transacted. We are of opinion, therefore, that as respects the Government, jurisdiction is given by clause 12 of the Letters Patent to try and determine the present suit.

The other question of jurisdiction is whether or not Mr. Cunliffe did at the commencement of the suit "carry on business" within the meaning of the clause, and, we are of opinion, that he did not. The facts proved are that Mr. Cunliffe is the Collector of Madras; that before April 1860, the Collectorate of Madras was conterminous with the local limits of the jurisdiction of the late Supreme Court, and the Collector carried on all his business at the office on the Mount Road, within the same limits. That in April 1860, the appointment of a separate Collector to the adjoining Collectorate of Chingleput was done away with, and from that time, Chingleput has been annexed to Madras and placed under one Collector. That no part of Chingleput is within the local limits of the late Supreme Court; nor consequently within the limits of the local jurisdiction of the High Court, and since the annexation the Collectorate business of Madras and

(a) 30 L. J. Q. B. 331.

Chingleput has been kept distinct and carried on in separate offices. That the business office and place of residence of the Collector has been at Sydapet within the old district of Chingleput, where he personally conducts all the business of that district; and a fully empowered Deputy Collector has resided within the limits of the former Collectorate of Madras, and has, subject to the Collector, personally conducted at the office on the Mount Road, the whole of the business formerly transacted by the Collector. Mr. Cunliffe, it was distinctly proved, never personally attended at the office on the Mount Road for the transaction of any business whatever, and all appeals and references from the Deputy Collector were received and attended to by him at his office at Sydapet. And it appears also that he is a magistrate only within the former Chingleput district. Now the alternatives on which the jurisdiction of the Court is alike made to depend, are that the defendant should "dwell or carry on business, or personally work for gain within the local limits," and we think that carrying on business by the defendant personally is what is meant by the clause. Dwelling is a personal act, and the working for gain is expressly required to be personal, and, we think, a personal attendance to business was intended. It could not have been intended that the carrying on of business was to be taken in its most general sense. If that were so, a man living at Calcutta or Bombay, or any other distant place, and there carrying on in person his business, might, because of his carrying on business here by a gumásh-ta, clerk or agent, or by occasional visits only, be sued in this Court at the discretion of the plaintiff without any regard to the place where the cause of action arose. This evident inconvenience and hardship could not have been intended by the Letters Patent; the intention must have been that the words "carrying on business" should be taken with some limits; and we think that when read with the other words of the clause, the proper construction is, that to give jurisdiction there must be the regular carrying on of business by the defendant personally within the local limits. We may refer on this point to the case of *Mitchell* v. *Bender*(a). In this case it is proved that the defendant, Mr. Cunliffe, did not at the commencement of the suit in any respect person-

(a) 23 L. J. Q. B. 279.

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ally carry on his business within the local limits, and we think that it can make no difference that his orders and proceedings were in his name of office as Collector of Madras, such orders and proceedings having been made and issued by him at Sydapet while personally carrying on his business there. He is therefore entitled to the judgment of the Court upon the first issue.

We have now to decide whether the plaintiff has established his right to recover against the Government. The liability or non-liability of the Government for the alleged wrongful acts of the Collector has not been put in issue, otherwise, we might have disposed of the case shortly upon that point. But upon the second issue before us, the question in this respect is whether the exclusive right to cut the jungles was sold by the Government and the Collector to the parties who executed the contract of the 19th February 1862 (No. 5) and whether such right was transferred so as to confer upon the plaintiffs a right to maintain the suit. The evidence in the case satisfactorily establishes that the villagers of the villages to which the jungles were attached had the right to obtain from them wood for agricultural purposes and firing, and to collect leaves and graze cattle, having no other allotment from Government, and that what was sold and purchased, as the parties well knew, was the proprietary right of the Government subject to the villagers' right and to the stipulations made for the preservation of the jungles. We can come also reasonably to no other conclusion than that the right to fell the wood was sold to the parties not exclusively for themselves but to them and the other villagers for their common benefit, and that the parties executed the original agreement both for themselves, and as agents and representatives of the other villagers. The plaintiffs gave no evidence upon this point beyond the fact of the execution of the sub-contract to them, relying upon the admission of the defendants contained in the introductory statement to the second issue without reference to the qualification accompanying it. Whilst on the other side, there is the distinct evidence of the Collector and other witnesses to the effect that the maṇiyagárs, who in all matters with the Government, represent the villagers, bid at the sale on behalf

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of the other villagers and, as one witness stated, in consultation with the ryots present, on the one hand; and that Kuḻandai Rámaiyá, a stranger, alone bid against them; and the order of the Collector of the 6th February (No. 6) in terms states that the maṇiyagárs *and the ryots* were the highest bidders, and directs the táhsíldár to divide the amount agreed to be paid in accordance with the condition of each jungle, and obtain muchalkás from them. And under this the agreement is entered into with the maṇiyagárs as such and one or two ryots, if the plaintiffs' evidence in that respect be correct, for the felling both *wood and fuel* for three faṣlís at rupees 300 per faṣlí, and apportioning the amount of security amongst the three villages; and thereupon the Collector's order is issued for delivering possession of the jungles to the maṇiyagárs *and ryots* of the several villages.

The right, then, under the contract being in the villagers of each village as a body, and being in its nature entire and indivisible, such right could not legally and equitably be transferred to the plaintiffs without the consent, either express or implied, of the other villagers. No evidence has been offered by the plaintiffs to shew this, and none of the parties who signed the original contract has been called, which circumstance, we think, tells against their having been purchasers on their own account alone, or having obtained any assent to the transfer.

On the other hand, there are the petitions of complaint of the villagers marked (B) and No. 2, together with the immediate public proceedings of the Collector thereupon, all of which make it impossible to doubt that the villagers, so far from assenting to the sub-contract, regarded it as a fraud upon and injury to them; and, the maṇiyagárs having sublet at a considerable profit, we hear nothing of any sharing or offering to share the amount proportionably amongst the villagers. Upon the facts in evidence we think that the plaintiffs have failed to establish the exclusive title relied upon and their right to recover in this suit; and that the Government are entitled to a judgment upon the second issue. It becomes unnecessary to say any thing on the third issue.

Suit dismissed with cost

Appellate Jurisdiction (a)

Special Appeal No. 129 *of* 1862.

PRAMATAN TUPEN NAMBU'DRIPA'D......*Appellant.*
MADATIL RA'MEN..............................*Respondent.*

A mélkáṇamdár cannot eject a káṇamdar or his assignee before the expiration of twelve years from the date of the káṇam.

1863. *March* 28. *S. A. No.* 129 *of* 1862.

THIS was a special appeal from the decision of H. D. Cook, Civil Judge of Calicut, in Appeal Suit No. 492 of 1860, affirming, substantially, the decree of the District Munsif of Ernád in Original Suit No. 20 of 1857.

That suit was brought for the restoration of lands originally the janmam property of the first plaintiff, which he assigned on káṇam mortgage to the first defendant in 1847, and of which, in 1855, on the latter refusing to make a further advance of money on the security of the property, he transferred the right of possession by a mélkáṇam deed to the second plaintiff. The second plaintiff accordingly sued in virtue of this transfer, for the recovery of the lands in question with arrears of net rent, on payment of the value of the mortgage and improvements.

The seventeenth defendant pleaded that in 1856 he had obtained a legal assignment of the first defendant's káṇam claim, and that the second plaintiff had no title to eject him from possession.

The District Munsif passed judgment in favour of the second plaintiff as respects possession of the lands with arrears of rent from the year 1855-56. On appeal this decree was substantially confirmed by the Civil Judge.

The seventeenth defendant preferred a special appeal against the Civil Judge's decree.

Mayne, for the special appellant, the seventeenth defendant. The first defendant, and therefore the seventeenth defendant who claimed under him, had a right to hold the káṇam for twelve years, of which only seven had expired at the date of the transfer to the second plaintiff.

(a) Present Frere and Holloway, J J.

Branson for the special respondents, the plaintiffs. 1863. *March* 28. *S. A. No.* 129 *of* 1862.

FRERE, J.:—It is admitted in this case that the first defendant held under a kánam mortgage of the year 1847; and the seventeenth defendant, who obtained an assignment of his claim, was therefore by the law and usage of Malabar, entitled to remain in quiet and unmolested possession for the remainder of the term of twelve years to be calculated from the date of the mortgage of 1847. Consequently in 1857, when the present suit was filed, neither the first nor the second plaintiff had any cause of action against the seventeenth defendant as respects the recovery of the lands, and we must pronounce that the decree of the Civil Judge is so far not sustainable. With the award of the arrears of rent payable by the seventeenth defendant, we see no occasion to interfere.

We shall therefore modify the decree of the Civil Judge to the above extent, and pronounce the plaintiffs to be entitled to recover their costs from the seventeenth defendant in proportion to the amount allowed.

HOLLOWAY, J.:—Twelve years from the passage of the káṇam of which the seventeenth defendant is the assignee not having elapsed, it is quite clear that the plaintiffs have no title to the immediate possession of the land. The principle of recent decisions of this Court that the right to twelve years' enjoyment is not repealed by the non-payment of rent are in accordance both with the old customs of Malabar and with the principles of general jurisprudence which govern a contract of the nature of káṇam. I abstain from giving an opinion upon the effect of such negligent dealing with the property as is calculated permanently to impair its value. The findings of the lower Courts upon this matter are much too vague to permit of an opinion whether there was any negligence whatever. Confining myself to the ground taken by the lower Courts, I quite concur with the judgment of my brother Frere.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 14 *of* 1863.

SAMBANDA MUDALIYA'R......................*Appellant.*
NA'NASAMBANDAPANDARA and others....*Respondents.*

The paid managers of the affairs of a pagoda have no power as such to encumber the pagoda-property or to settle large outstanding demands against it.

Persons dealing with such managers are bound to enquire into the extent of their authority.

A person bound to make an enquiry and failing to do so, will be held to have notice of all such facts as that enquiry, if made, would have brought to his knowledge.

1863. *March* 28. *R. A. No.* 14 *of* 1863.

THIS was a regular appeal from the decision of E. W. Bird, the Acting Civil Judge of Negapatam, in Original Suit No. 2 of 1861.

Branson for the appellant, the plaintiff.

Norton for the respondent, the first defendant.

The facts appear from the following judgment, which was delivered by

FRERE, J.:—This was a suit for the recovery of the sum of rupees 68,074-14-6 said to be due, inclusive of interest, on a bond executed in favour of the plaintiff in 1853 by the second defendant, acting in his capacity of agent or manager of the affairs of the Çrí Vaidyanádasvámi temple at Chíyáḷi. It was alleged in the plaint that for a long series of years debts had been incurred from time to time by the managers of the temple in question, in the course of their transactions with the plaintiff, and that these accounts were finally adjusted on the above date, when the bond was executed by the second defendant on behalf of the temple.

The first defendant, a director of the temple, pleaded that the second defendant had no authority to execute such a deed; that by agreements entered into and committed to writing in 1849, he, the second defendant, was expressly restricted from exercising any power beyond the ordinary management of the current affairs of the temple; that he

(a) Present Frere and Holloway, J J.

was dismissed for misconduct in 1859, and that the present suit is the result of collusion between the plaintiff and the second defendant who has possessed himself of the sikka sanads or title deeds of the temple C and D, and has made them over to the plaintiff for the purpose of giving a colour to his pretended case against the temple. The first defendant proceeded to state that the plaintiff's family had formerly a claim against the temple, but that this claim was fully discharged prior to the year 1848. The answer of the third defendant, the present agent or manager, was to the same effect.

The Civil Judge, after considering the evidence advanced on both sides, expressed his opinion that the first and third defendants' chief plea as regards the absence of authority to execute such a deed as that on which this suit is founded, was fully proved by the agreements 3 and 4 dated in July 1849, which showed that the second defendant was simply a paid agent of the temple, liable at any time to dismissal at the will of the director of the temple, the first defendant. The Civil Judge further observed that the apparent collusion between plaintiff and the second defendant fully accounted for the possession by the former of the sikka sanads C and D, which were in the custody of the latter while in office and were subsequently found to be missing, and that the bond A itself, on which the plaintiff's claim is based, appeared to be undeserving of credit, with reference to the fact that the material on which it is drawn up, is a mere unstamped cadjan; that the evidence to it was contradictory, and that it was unsupported by any written evidence of a contemporary adjustment of accounts, as usual in the case of transactions to so large an amount. The Civil Judge accordingly dismissed the plaintiff's claim with all costs of suit.

The plaintiff has now appealed against this decision.

I have little to observe on this case, concurring as I do entirely in the view which the Civil Judge has taken of its merits. It is admitted, indeed, that the plaintiff or his family had at one time a claim against the temple; but beyond the single deed A, there is no documentary evidence to shew that this claim existed at any later date than the year 1830, thirty-

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one years prior to the institution of the present suit. There is nothing in evidence which can justify the inference that at the date of A the plaintiff could, in good faith, have supposed the second defendant to be vested with the necessary authority for the execution of such a deed; and on a view of the entire case, I am led irresistibly to the conclusion that this deed is fictitious, and the result of collusion between the plaintiff, a former creditor of the temple, and the second defendant, the dismissed agent of that institution. I am therefore of opinion that this appeal must be dismissed with costs.

HOLLOWAY, J.:—The evidence in this case is wholly insufficient to establish that the document sued upon was executed by the second defendant while acting as agent of the trustees of the institution. The absence of a stamp-paper for the execution of a document for so large an amount far outweighs the oral evidence of that execution. Further, I am clearly of opinion that if executed, it would not have bound the trustees of the institution. It was argued that the authority to execute must be presumed and that the plaintiff could only be bound by the documents 3 and 4, if he had notice of them. There would be something in this argument if the pledging of pagoda-property was *primâ facie* within the scope of the authority of the paid servants of the trustees of a pagoda. It is quite clear, however, that the natural duties of such persons are confined to the conduct of the ordinary daily business of the institution, and by no means embrace the encumbering of the property and the settlement of large outstanding demands. The position of the second defendant was therefore one calculated to put the plaintiff upon enquiry, and if he had enquired, as he was bound to do, he would have discovered that the second defendant was by express agreement disabled from executing such a document as that sued upon. He must be held to have notice of all such facts as an enquiry, which he was bound to make, would have brought to his knowledge. I therefore quite concur in the opinion that the decree of the Court below is in all respects right, and that this appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 12 *of* 1862.

STRI'MAN SAḌAGO'PA'.........................*Appellant.*
KRISTNA TATA'CHA'RIYA'R and another.*Respondents.*

A Hindú priest cannot sue in respect of the withholding of religious observances due to his sacred rank, but unconnected with any special office held by him, although the non-performance of such observances may have caused him some ascertainable pecuniary loss.

Special Appeal No. 94 *of* 1861 affirmed.

THIS was a regular appeal against the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 2 of 1861. 1863. *March* 30. *R. A. No.* 12 *of* 1862.

The plaintiff, the gurukkaḷ(b) of Çrí Ahóbaḷam Maṭham, sued the defendants, the wardens of the pagoda of Çrí Dévarájásvámi at Conjeeveram, for damages for injury done to him by withholding from him certain honours and emoluments, and also sought to have his right to such honours and emoluments established for the future.

The honours were specifically enumerated in the schedule annexed to his plaint and marked *A*, and the emoluments in the schedule marked *B.* The plaint alleged that from time immemorial, the predecessors of the plaintiff, and the plaintiff himself during his tenure of office, were entitled to and received those honours and emoluments from the dharmakarttás of the pagoda of Dévarájásvámi at Conjeeveram and from the worshippers at that pagoda; and that while the pagoda was in the hands of Government such honours and emoluments were awarded under the authority and order of the Collector for the time being. In the month of Vaikási (May—June) of the year Raudri (A. D. 1860) the plaintiff informed the defendants of his intention to proceed to the annual festival of Dévarájásvámi at Conjeeveram and called upon them to receive him with the honours and emoluments due to his rank. The defendants promised to do so, but by various false excuses delayed to comply with his demand, and after the plaintiff had waited at their request from the 21st day of Vaikási to the 10th day of Puraṭṭási (September—October) finally failed to receive him in the

(a) Present Scotland, C. J. and Frere, J.

(b) The honorific plural of *guru*, " spiritual teacher or guide."

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manner to which he was entitled and in which they had promised to receive him.

Schedule A was as follows :—

"Two garlands, cocoanuts, plaintain-fruits and sandalwood to be presented when istikbál(a) was brought to the guru. Taking the guru from the place of istikbál to the maṭha(b) with blue-fire, torches and with other celebration.

"Presenting flower-garlands, abhaya-hastams(c), sandalwood and flowers at the maṇṭapa(d) of sixteen pillars. A silk parivaṭṭam(e) to be tied on the head of the guru and çrí saḍagópam(f) in the said maṇṭapa. Presenting abhaya-hastams, garlands and flowers to the guru before all the petty temples, except the principal god. Tagaḍu(g), a silk parivaṭṭam, two garlands, abhaya-hastams, sandalwood and flowers to be offered to the guru before the principal god. Tírttam(h) and saḍagópam(f).

"Nine iḍḍalis(i), 4½ measures of dósai(j), 4½ measures of vaḍai(k), 4½ measures of appam(l), 9 measures of ténkuḻal(m), 90 taḻigais(n) of different kinds, and 9 gúns(o) of bakkáḻabát(p): all these were to be brought to the guru by the wardens for nine days during the festival time.

"Blue-fire, flambeaux, rockets and other things to be supplied to the guru by the wardens when he is carried from the Gaṅga koṇḍa maṇṭapa to the maṭha."

(a) إستقبال "ceremonious reception."

(b) A small temple.

(c) Abhaya-hastam is a gesture made by holding the right hand up and the left down, both palms being turned outwards. Skr. *abhaya* 'fearlessness' and *hastam* 'hand.'

(d) Porch.

(e) பரிவட்டம் 'cloth.'

(f) சடகோபம் a crown of copper or brass either gilt or plated.

(g) தகடு a metal plate.

(h) தீர்த்தம் Skr. tírtham, "ein krug mit wasser von einem geheiligten badeorte." Böhtlingk-Roth III, 346.

(i) An இட்டலி is a cake made of ghí, chili and raw rice.

(j) A தோசை is a thin iḍḍali without the chili, about a quarter of an inch thick.

(k) A வடை is a circular cake of uḷundu or pulse (phaseolus mungo, L.) and rice-flour fried in ghí, with a hole in the centre.

(l) An அப்பம் is a cake of raw rice, ghí and, optionally, treacle. Hence the Anglo-Indian *hopper*.

(m) A தேன்குழல் is a cake of rice or gram and ghí made in a mould, from tén 'honey' and kuḻal 'a pipe.'

(n) Messes of boiled rice, தளிகைகள்.

(o) A கூன் is an earthen vessel holding about a measure.

(p) A fluid mixture of rice, curds, onions and mustard, பக்காளபாத்.

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Schedule B was as follows :—

	Rs.	A.	P.
"Expenses incurred from 21st Vaikási to 10th Puraṭṭási..	14,300	0	0
"Damages for loss of dignity......................	10,000	0	0
"Loss of emoluments as follows:—			
"Two garlands, two cocoanuts, two plaintains, and sandalwood, when istikbál was brought to the guru............................	2	0	0
"Blue-fire (mattápu) and torches (díviṭṭigaḷ) when the guru was taken from the place of istikbál to the maṭha................................	35	0	0
"Abhaya-hastam, garlands, sandalwood and flowers at the manṭapa (porch) of sixteen pillars..	2	0	0
"A silk parivaṭṭam tied on the guru's head at that manṭapa.................................	5	0	0
"Abhaya-hastam, garlands and flowers before the petty temples, tagaḍu, abhaya-hastam, garlands and flowers before the principal god; 18 iḍḍalis at 8 annas, 4½ measures of dósai at 2½ rupees, 4½ measures of vaḍai at 1½ rupee, 9 measures of appam and adirasam(a) at 1½ rupee; 9 measures of ténkuḻal at 9 annas 1 pie; 54 taligais of tattiyódanam(b) at 8 annas; 18 measures of sakkaraipongal(c) at 1 rupee; 18 measures of pongal(d) at 12 annas; 9 gúns of bakkáḷabát at 1 rupee..	111	15	0
"Blue-fire, flambeaux and rockets when the guru is carried from the Ganga konḍa manṭapa to the maṭha....................................	50	0	0
	327	15	0
"Establishment of right to the above emoluments valued at one year's produce.........	327	15	0
	24,955	15	0"

(a) அதிரசம் is a kind of sweet cake made of pounded rice, sugar and ghí.

(b) ததியோதனம் is boiled rice with curds and dry ginger, Skr *dadhyodana*, from *dadhi* 'curds' and *odana* 'boiled rice.'

(c) சக்கரைபொங்கல் is boiled rice, sugar, kasua nut and ghí.

(d) Sakkaraipongal without the sugar.

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In the course of the proceedings of the Civil Court of Chingleput there was read a copy of the judgment of the late Madras Ṣadr Court in *Special Appeal No.* 94 *of* 1861, dated 20th November 1861(*a*), which had been forwarded to the Civil Court, with a request that measures might be taken for the removal from its files of suits respecting matter of ceremonial usage unassociated with contract. The Civil Judge considered that judgment to apply and rejected the plaint accordingly.

(*a*) "The plaintiff are of the Tengale caste [*rectè* 'Tengalai sect,' *scil.* of Vaishnavas, from *ten* 'southern' and *kalai* 'philosophy' Skr. *kalá*] and the defendants of the Vadagale, [*rectè* 'Vaḍagalai,' வடகலை, from *vaḍa* 'northern' and *kalai*], and are worshippers together in the same pagoda at Conjceveram. The suit has been brought to regulate the ritual of the pagoda service on which, being of opposing sects, the parties are at issue. The particular grounds of contention, as described by the Acting Civil Judge, are at what time the plaintiffs may join the defendants in the recitation of a prayer; which of the plaintiffs is entitled to do so; whether the Tengal[ai] priest is entitled to a blessing to be pronounced at the conclusion of the prayer; whether a hymn may be sung in his honour; whether certain festivals called birth-star festivals are to be kept; and whether the images may be taken out in procession." * * * * *

"In dealing with this appeal, the Court have confined themselves to the question whether a suit of the present description properly falls within their jurisdiction. Were any pecuniary considerations involved in the issue of the suit, the Court would have no hesitation in treating the suit upon its merits; but such is not the case. The contest relates purely to the constituents of religious worship, and in no respect embraces any civil rights. So clearly is this its character, that the plaintiffs have not even thought of alleging their title to any compensation from the defendants by suing for damages. They simply require at the hands of the Court the regulation of their ritual.

Matters of mere ceremonial or religious usage have certainly hitherto on various occasions come before the Court, and have elicited their judgment on the points in dispute, and the whole question, whether or not the Court really possessed any jurisdiction over such disputations, was fully gone into on the disposal by them of appeal No. 125 of 1858. [M. S. D. 1858, p. 256.] On that occasion the bench were not unanimous in their decision, but the opinion of the majority was in favour of exercising the jurisdiction.

The Court have given that decision and the arguments of counsel upon the question their careful consideration, and the opinion at which they have arrived is that they possess no jurisdiction to warrant their pronouncing judgment upon subjects such as are now in issue. They feel, to adopt the language of the present civil code of procedure, that their authority extends only to the "cognizance of suits of a civil nature;" and it is obvious to them that the present suit is not of that description. It required, in the parent country, the creation of a special tribunal to undertake to regulate mere religious usages, unassociated with contract, and the operation of that tribunal has been confined to the protection of the interests of the form of worship of the state. The Court have had no such special powers conferred upon them. They are in the position of the ordinary civil tribunals of the parent country, whose want of such powers led to the erection of the ecclesiastical court to which reference has been made, and the form of worship of the parties to this suit is not even that which is followed by the state.

Believing thus that they are precluded by absence of authority from entering upon the questions involved in this suit, the Court resolve, in reversal of the decrees below, to dismiss the suit with costs." M. S. J. 1861, pp. 152, 153.

Mayne, for the appellant, the plaintiff, contended that *Special Appeal No.* 94 of 1861 did not apply; and that the suit was one which might and ought to be decided in the Civil Courts, as the deprivation of the usage or honours to which it referred involved ascertainable pecuniary loss or damage. He cited *Special Appeal No.* 125 *of* 1858 M. S. D. 1858, p. 256; distinguished *Special Appeal No.* 94 *of* 1861 M. S. J. 1861, p. 152 and *Special Appeal No.* 354 *of* 1861 M. S. J. 1862, p. 63, and referred to Act VIII of 1859, sec. 1, which provides that "the Civil Courts shall take cognizance of all suits of a Civil nature, with the exception of such of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras and Bombay respectively, or by any Act of the Governor General of India in Council."

1863. March 30. R. A. No. 12 of 1862.

Saḍagópáchárlu (*Rangácháriyár* with him) for the respondents, the defendants.

First. The suit relates to the internal economy and management of the temple, matters solely within the discretion of the dharmakarttás, *Special Appeal No.* 354 *of* 1861 M. S. D. 1862, p. 63.

Secondly. This Court has no jurisdiction respecting ceremonial or religious usage, affecting the rituals of Hindú temples, *Special Appeal No.* 94 *of* 1861 M. S. D. 1861, p. 152: Mr. Justice Strange's judgment in *Special Appeal No.* 125 *of* 1858 M. S. D. 1858, p. 257. This is not the case of a mírási office involving remuneration to the holder, 2 Madras Sel. Dec. pp. 77, 83.

Thirdly. The plaintiff has no right of action. His complaint is merely of the breach of a piece of religious etiquette, *Special Appeal No.* 100 *of* 157 M. S. D. 1857, p. 194: *Special Appeal No.* 21 *of* 1859 M. S. D. 1859, p. 76: *Special Appeal No.* 99 *of* 1858 Ibid. p. 60.

Fourthly. There was no consideration for the promise made by the defendants. *Special Appeal No.* 21 *of* 1859 M. S. D. 1859, p. 76.

Fifthly. No damages can be recovered for withholding religious honours. *Special Appeal No.* 99 *of* 1861 M. S. D. 1862, p. 4.

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Mayne replied.

SCOTLAND, C. J. :—I think enough appears to warrant our deciding the case upon the plaint, and I am opinion that the Civil Judge's decision is right. This case is not in its circumstances the same as *Special Appeal No.* 94 *of* 1861. There the suit was simply for the regulation of the ritual of the pagoda as connected with certain observances of religious worship, and no claim was made or question raised as to the value of offerings or in respect of any pecuniary damage sustained. In that decision I entirely concur; and should at once follow it without saying more, were the circumstances of this case precisely similar. But there is this difference, that here the plaintiff's claim includes under the head of "emoluments" a number of items to each of which a money value is attached, and one or two of which appear not to be of a perishable nature; and besides these, there are two sums of considerable amount claimed for loss of dignity and the expenses incurred in the ceremonials connected with the plaintiff's visit. And the question is whether these circumstances so distinguish the present case as that the principle and reason upon which the former decision properly rests cannot be held to affect the plaintiff's right to proceed in this suit.

After giving the point and the arguments my best consideration, I have come to the conclusion that we can make no such distinction, and that the matters of claim here are not of such a civil nature as entitle the plaintiff to maintain a civil suit. We must first consider what is the nature of the subject-matters in respect of which the plaintiff seeks to recover as damages the money-items particularized in the plaint. By merely affixing a money-value, the plaintiff of course cannot give himself a right to sue which he does not otherwise possess. Now though the word "emoluments" as well as the word "honours" is used in the plaint, and doubtless ordinarily means temporal gains, profits and advantages, in respect of which a right to bring a civil suit clearly exists, yet we must look in this case to the items of claim in the schedule to which alone the word applies, and these clearly shew that every one of the matters in respect of which the suit is brought, is purely a matter of religious and sacred observance in connection with the worship and ceremonials at the pagoda, and is claimed by the plain-

tiff as a matter of devotional respect and display due to his priestly rank or as a votive offering made to him whilst passing in procession through the temples, and when brought to the presence of the principal idol. Furthermore it appears and is admitted that the office of 'gurukkal' relates to the Hindú religion generally, and that all the offerings and devotional honours are claimed at this pagoda in common with those at other pagodas which the plaintiff might choose upon occasion to visit. He is not officially connected in any way with the management or control of the pagoda, or its property or funds; and the alleged dues of his office have no doubt been owing to the great reverence at one time entertained for his sacerdotal rank in the Hindú religion, and the importance from a religious point of view of his mere presence at the pagoda. But this would seem now to have become quite otherwise; and certainly the plaintiff's right to bring a civil suit ought to be very clearly established before we reverse the decision of the Court below. Substantially, as it appears to me, all the honours and emoluments in respect of which damages are sought, are in themselves matters purely of religious ceremonial and devotional observance, and are connected with a priestly office, which, as regards the dharmakarttás and worshippers at the pagoda in question has attached to it no other claim of right than that which rests upon the religious feelings which they, in common with other Hindú worshippers, entertain for the sacred position of the plaintiff. Such honours and emoluments cannot in any respect be considered as remuneration for duties or ministrations performed by the plaintiff in the secular affairs or religious services of the pagoda. Nor can it, I think, be said that the defendants as trustees of the pagoda-funds are compellable in law to expend those funds in defraying the costs of those honours and emoluments.

There is no doubt that the civil courts will recognize and enforce the rights of persons holding offices connected with the management and regulation of pagodas; and if the holder of such an office were entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit, if that remuneration were improperly withheld. So, too, suits are commonly entertained for the purpose of trying and deciding

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who are fit and proper persons of right entitled to be appointed dharmakarttás of a pagoda. In such cases it will be found that the offices have a secular character and are so dealt with, though religious duties are attached to them—the occupants being employed to exercise business functions, either as trustees and managers of the property and funds of the pagoda, or as overseers in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit. But nothing of this kind can be said of the plaintiff in his purely religious office of guru. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present civil courts cannot take cognizance. And it is of great importance, I think, in this country, that the courts, exercising their civil jurisdiction as now provided, should carefully guard against entertaining suits in respect of mere ritual observances and the conduct of the various kinds of native religious worship and ceremonies, and of what as incident thereto may be due to the sacred character or the religious rank and position of individuals. With such matters the courts cannot properly deal, and if their jurisdiction extended to interference in them the law would, I fear, be made instrumental in upholding and continuing the ceremonials and superstitious observances of idol-worship, for the benefit merely of the few who profit by them.

Being, then, of opinion that the subject-matter of the present suit is purely religious, and relates to the sacred office of the plaintiff, and has no connection with any rights that can properly be considered as being of a civil nature, I think this is not a suit of such a civil nature as by the first section of the Code of Civil Procedure, the Civil Courts are required to take cognizance of, and that the Civil Judge was right in rejecting the plaint.

The appeal must therefore be dismissed.

FRERE, J., concurred.

Appeal dismissed.

Appellate Jurisdiction (*a*)

Special Appeal No. 100 *of* 1862.

MUTTUSVA'MI' GAUṆḌAN and another.......*Appellants.*
SUBBIRAMANIYA GAUṆḌAN and another.....*Respondents.*

While the members of a Hindú family enjoy in common undivided property, money expended in its improvement or repair is considered as spent on behalf of all the members alike, and all have the benefit of the outlay when a division takes place.

There is no rule of law precluding one member of an undivided Hindú family though living together, from entering into an agreement with his co-parceners in respect of the expenditure on family property and repayment of self-acquired funds; and such an agreement is rendered more reasonable and probable where portions of the family-property are occupied and enjoyed by each of the members living separately.

1863. *March* 30. *S. A. No.* 100 *of* 1862.

THIS was a special appeal from the decision of Shaikh 'Abd-ul Rahimán, the Principal Ṣadr Amín of Coimbatore, in Appeal Suit No. 247 of 1861, reversing the decree of S. K. Visvanáda, the District Munsif of Vaḍamálpéṭṭai in Original Suit No. 739 of 1859.

Saḍagópáchárlu for the special appellants, the defendants.

Branson for the special respondents, the defendants.

The facts appear from the following

JUDGMENT:—This suit was for a division and share of lands constituting a portion of the family-property of the parties. It was alleged in the plaint that the plaintiffs and defendants, who are all members of an undivided family, occupy separate houses and separate portions of the lands composing the family estate; and that the plaintiffs are entitled to a moiety of the lands in possession of the defendants, for the recovery of which they accordingly instituted this suit, as also for an equal division of the house now occupied by the defendants.

The defendants pleaded that by an agreement executed in 1858 by the plaintiffs it was stipulated between the parties that no division of the lands should take place until the

(*a*) Present Scotland, C. J. and Frere, J.

1863. March 30. S. A. No. 100 of 1862.

plaintiffs had reimbursed to the defendants the value of the improvements made by the defendant's father, Vaḍivélappa-gaunḍan, upon that part of the lands which was in their occupation, and that the value of these improvements should be enquired into and adjusted by arbitration. The defendants therefore urged that the plaintiffs had failed to act up to the conditions of this agreement, and that they had consequently no cause of action.

The District Munsif observed that this agreement, which was filed by the defendants as No. I in the present case, was admitted by the plaintiffs to be a genuine instrument, and, considering the argument of the defendants to be founded in reason and justice, he dismissed the claim of the plaintiffs with costs. This judgment was, however, reversed in appeal by the Principal Ṣadr Amín, who decreed for the plaintiffs, on the ground that the family were allowed to be undivided, and that a charge incurred by one member must therefore be held to have been on behalf of the entire family, a rule which barred any claim for re-payment to that individual member only; and consequently that the agreement was not binding upon the plaintiffs. The Principal Ṣadr Amín was also of opinion that the defendants had failed to prove that the house was their own self-acquired property.

The defendants preferred a special appeal against this decision, and we are of opinion that the decree of the Principal Ṣadr Amín must be reversed.

The members of this family, though undivided in property, have, it appears, lived apart and occupied and enjoyed separate portions of the land in question and not the whole of it in common; and the plaintiffs are themselves parties to the agreement (No. I) relied upon by the defendants, and must be taken to have entered into it with a full knowledge of its meaning and purpose. We have not before the Court the precise grounds upon which the agreement was come to; but it seems to have resulted from a mediation between the parties; and under the circumstances here, it is easy to suppose a state of things which would make such an agreement reasonable; and effect ought be given to it as against the plaintiffs (parties to it) unless there is some rule of law which affects its validity. As a general rule no

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doubt, where undivided property is being enjoyed in common by the members of a Hindú family, money expended in the improvement or repair of the property, is considered as spent on behalf and for the advantage of all the members alike, and all have the benefit of the outlay when a division takes place. But there is no rule of law, that we are aware of, which precludes one member of an undivided Hindú family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure upon the family property and re-payment of self-acquired funds; and such an agreement is rendered more reasonable and probable, where portions of the family property are occupied and enjoyed, as in this case, by each of the members living separately. There is therefore, we think, nothing illegal or unreasonable in the agreement by which it was in effect stipulated that prior to division of the estate the defendants should be reimbursed those sums which their father had laid out from his own private means, upon the lands in his separate possession, and as their own contract, we must hold it to be binding upon the plaintiffs, and consequently the present suit, in which the plaintiffs set at nought the agreement and seek a division of the property contrary to its terms, cannot, we think, be maintained.

With reference to the house in question, it is not necessary for us to do more than observe that having failed in respect of their claim to a division of the other property, the plaintiffs cannot now legally enforce a division of the house alone.

Our judgment therefore is, that the decree of the Principal Ṣadr Amín be reversed and the claim of the plaintiffs dismissed with costs of suit. The plaintiffs, however, will not be precluded from suing hereafter for division of the family-property, in accordance with the terms of their agreement above mentioned.

NOTE.—See *Nub Koomar Chowdry* v. *Jye Deo Nundee*, 2 S. D. A. Rep. 247: 1 Morl. Dig. 606: 1 Strange H. L. 199: 2 Ibid. 336,343,346: 1 Coleb. Dig. 283: *Goluchnauth Bose* v. *Rajkissen Bose* Fult. 401: *Special Appeal* No. 37 of 1860, M. S. D. 1860, p. 16.

Appellate Jurisdiction (a)

Regular Appeal No. 10 *of* 1862.

TIRUMALA RAU SA'HIB...............*Appellant.*
PINGALA SANKARA RAU..............*Respondent.*

Where A sued B for moneys alleged to be due under certain documents and B pleaded that the demands had been included in a settlement of accounts, embodied in a document which he set forth in his answer, and the suit was dismissed on the ground that being included in the settlement, the demands no longer existed as causes of action:—*Held* that A's representative was not estopped from disputing the document in a subsequent action brought by him against the representative of B.

The conclusive effect of *res judicata* defined.

Eastmure v. *Laws* concurred in.

The law of British India as administered in the Mofussil recognises no distinction between specialties and other documents.

1863. *April* 11. *R. A. No.* 10 *of* 1862.

THIS was a regular appeal from the decision of C. Collett, the Acting Civil Judge of Chittúr, in Original Suit No. 3 of 1861. The suit was brought to recover twenty-nine gold and silver jewels, valued at rupees 14,553, which the plaintiff's father had pledged to the defendant's father. On the 23rd May 1851, an account (marked A) was stated and signed by the latter according to which the balance due by the former was only rupees 248-10-9. By the same account the defendant's father promised that, within two months from the date thereof, the jewels should be returned to the plaintiff's father, he paying the balance due. The respective fathers of the plaintiff and defendant having both died, the present defendant brought two suits against the present plaintiff for money alleged to be due on certain documents from the plaintiff's father to the defendant's father. The defendant (the present plaintiff) in each case pleaded that the demands had been included in a settlement of accounts and set out the particulars of a document (identical with A) alleged to have been executed by the then plaintiff's father. Both suits (*Appeal Suit No.* 137 *of* 1858 in the Civil Court and *Special Appeal No.* 146 *of* 1858*(b)*, were ultimately dismissed on the ground that being included in this settlement the demands sued upon no longer existed as causes of action. The present plaintiff afterwards applied to the defendant to receive the balance and return the jewels: but the defendant had refused and neglected to do so. When the cause came

(a) Present Frere and Holloway, J J.

(b) M. S. D. 1858, p. 218.

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on to be heard the defendant denied that the account was executed by his father, and the plaintiff alleged that its execution was the basis of the two decrees (to both of which suits the plaintiff and defendant were parties) and that the defendant was therefore estopped from denying the account.

The Civil Judge delivered a judgment from which the following is an extract.

"I am opinion that this issue of law must be decided in favour of the plaintiff, and that the defendant is now estopped by reason of previous judgments from denying that the document filed in support of the plaint was executed by his father. I think this case falls within the rule laid down in *Eastmure* v. *Laws*(a), and I am glad to guide myself by that decision. There the plaintiff brought an action of debt, and the defendant pleaded that he had formerly sued the plaintiff when the plaintiff had pleaded the present demand by way of set-off. The plaintiff replied that no evidence had then been offered in support of the said plea of set-off. But on demurrer it was held that after a precise issue had been found against the plaintiff, he might not bring an action and agitate the whole matter over again, and that an estoppel cannot be set aside on the ground set forth in the replication. The present appears to me a stronger case. In *Appeal Suit No.* 137 *of* 1855 of this Court, there was an appeal from a judgment of the sub-court in which the genuineness of the present document was a precise issue in the cause, and that issue was found in favour of the present plaintiff, and that judgment was a final one, a special appeal from it having been rejected. In that suit the present defendant sued the present plaintiff on one of the deeds specified in the document now in question. The present plaintiff then pleaded the settlement of accounts, and put in the present document, and evidence was gone into as to the execution of the document. The sub-court found the issue in favour of the plaintiff (present defendant) but on appeal this court reversed the judgment of the lower court, and, as appears from paragraph 3 of the judgment, because this issue as to the settlement of accounts by the present defendant's father was found in favour of the present plaintiff. A special

(a) 5 Bing. N. C. 414 : see 2 Sm. L. C. 666 (5th Ed.)

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appeal was made to the Ṣadr, but was rejected. Something was said in the course of argument as to the remarks of the Ṣadr Court in paragraph 3 of their proceedings. But if those remarks could be made to bear a meaning in conflict with plaintiff's claim, which I do not see how they can, I conceive that they are not entitled to more authority than that of an *obiter dictum* and are not a judicial decision. The identity of the present document with that produced in *No.* 137 *of* 1855 is beyond dispute; the signature which it bears and a comparison with the authenticated copy retained in the proceedings of that case place the matter beyond question.

"There was also another suit between the same parties on another bond, in which the same document settling the accounts was relied upon in defence. The final decision on special appeal is reported in M. S. D. 1858, p. 218. Evidence was not, it seems, gone into, as to the genuineness of the document in this suit. But the judgment of this court was pronounced in both suits on the same day, which perhaps accounts for it. Anyhow the judgment in the special appeal was in favour of the issue as to the genuineness of the document.

"I hold to the doctrine and adopt the language stated in 2 Sm. L. C. 5th ed. 669—that it is not necessary that the point on which it is sought to estop should have been *the only one in issue* on the previous occasion. It is enough if it be one which *must* have been decided(a). Nor need the form of action be the same in each case(b). Or, to adopt the words of Best on Evidence, pp. 702, 703, 2d. ed. [p. 774 3d. ed.] judgments are conclusive when given in a matter in which the person against whom they are offered in evidence has, either really or constructively, had an opportunity of being heard and disputing the case of the other side.

"It has been stated to me that the present matter was discussed and disposed of by my predecessor Mr. Harris. If so there is nothing to show it. I find that Mr. Harris, adhering to the old practice, gave points, but did not settle issues. Now with every respect for his opinion, I take leave to say that this is not what the law requires. If points are given, and the court finds that one party is estopped from disputing a deed, no doubt it would be needless to give any

(a) *Rex* v. *St. Pancras*, Peake, 219.
(b) *Cleve* v. *Powel*, 1 M. and Rob. 228: *Hitchin* v. *Campbell*, 2 Bla. 830; and see *Supra* p. 245.

point as to proof of the deed. But there is a wide distinction between giving points and settling issues, and if the parties dispute, as in the present case they do, whether or not there is an estoppel in respect to a deed, the foundation of the whole suit, I do not comprehend how the court can avoid recording and disposing of such issue. Having decided this issue of law in favour of the plaintiff, the issues upon which evidence will have to be given will be in substance the same as the points given by Mr. Harris; but should be stated in the form of issues thus:

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"Whether the jewels sued for, and specified in the document exhibit B, and the list annexed to the plaint are of the value stated in the plaint, or of what other value.

"Whether any, and which of the said jewels have been returned by the defendant to the plaintiff, subsequently to the date of the said document.

"As to the burden of proof on these issues, it may be convenient and expedient to point out that it is for the plaintiff in the first instance to prove the value, the defendant being of course at liberty to rebut this evidence by other evidence. But as the document in question is not a mere list or account, but an instrument duly signed by the defendant's father, and attested by witnesses: it is in its nature as high and deliberate a writing as an ordinary deed, and I therefore hold that it is not competent for the defendant to impugn any particular recital therein on any other ground or by any other means than it would be competent for him to do in the case of an ordinary deed."

Sadagópáchárlu, for the appellant, the defendant, rested his appeal on these, amongst other, grounds, that the judgments in *Appeal Suit No.* 137 *of* 1855 and on *Special Appeal No.* 146 could not estop the defendant from disputing the authenticity of A., and that costs had been taxed on rupees 5,003-8-0 instead of rupees 4,754-13-3, the sum actually awarded to the plaintiff.

The following judgment was delivered by

HOLLOWAY, J.:—This was a suit for the recovery of certain jewels pledged to the defendant's father for a demand of which all but rupees 248-10-9 had been discharged. An

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account stated between the fathers of the defendant and the plaintiff was alleged.

The defendant denied the account stated, and further alleged that the jewels had been returned.

The Civil Judge considered that the defendant was, on the principle of *Eastmure* v. *Laws*, estopped by the decree in *Appeal Suit No.* 137 *of* 1855 from disputing the document embodying the account stated. The Civil Judge further held the document to be of the same effect as a deed, and declared the defendant barred from disputing any particular recital therein on any other than such ground as would justify him in impugning a recital in a deed, but without saying what such grounds are. The defendant then went into evidence as to the return of the jewels, and disputed their value. The Civil Judge discredited the evidence as to the return of the jewels, and in his valuation for reasons stated adopted the sum of rupees 4,754-4-3.

As to so much of the appeal as touches the question of proportionate costs, the application for the amendment of what would be merely a clerical error should have been made in the Court below, and no order therefore should be made upon it.

As was stated at the hearing we see no reason whatever for dissenting from the conclusion at which the Civil Judge has arrived as to the non-return of the jewels. The valuation of the jewels has also been made in a manner by no means unfavourable to the defendant who being a wrongdoer perhaps ought on the findings of the Court below to have been charged a larger alternative sum than that awarded in case of non-return.

The real question in this case, is whether the doctrine of the Civil Judge, first, as to the estoppel by decree, and secondly, as to the estoppel by deed is well founded, and its real and only difficulty, and the only doubt which I have ever entertained, is whether if wrong, in the state of the case developed by the allegations on both sides and the proofs adduced, the error has produced such miscarriage upon the merits as to justify us in remanding the case. For with the whole matter before us in appeal, we are bound not for

mere technical correctness to protract litigation if satisfied that further enquiry cannot and should not produce any substantial change in the judgment delivered.

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The pleadings in the two suits from the decree in which the supposed estoppel by judgment has emanated were not before us at the hearing, and some delay has necessarily arisen from that circumstance.

Those two suits were brought by the present defendant against the present plaintiff for money alleged to be due on certain documents from the father of the plaintiff to the father of the defendant. The defendant in each case pleaded that the demands had been included in a settlement of accounts, and according to the practice of that period proceeded to set out the particulars of a document alleged to have been executed by the plaintiff's father. That document is the one which the execution and contents of which the Civil Judge has not allowed the defendant to dispute. The subordinate Court disbelieved and the Civil Court believed its execution, and the result was that both these suits were dismissed for the reason given by the Ṣadr Court, that being included in this settlement, the demands sued upon no longer existed as causes of action.

Eastmure v. *Laws* is undoubtedly a case of the highest authority proceeding upon the most intelligible principles. The defendant being permitted by statute to set off his cross demand pleaded it, but failed to prove it, and, judgment being given for the plaintiff, sought to recover the amount pleaded in set-off in a separate action. It would have been wholly contrary to principle if he had been permitted to do so, for looking at the common-law before the statute, he was to all intents and purposes in the position of a plaintiff who had sued for a sum of money and had a verdict against him. When properly limited to cases of the nature of *Eastmure* v. *Laws*, the doctrine quoted from Mr. Smith's note to the *Duchess of Kingston's Case* appears to me unobjectionable. But I am clearly of opinion that there is a fallacy in its application to the present case. Whether there was a settlement and an account stated was a precise issue in the cause, but the document was merely evidence upon that issue, and that issue might well have been found for the defendant there, whether that document was true or false.

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I adopt the language of Mr. Best which expresses with exactness the rule as to the conclusive effect of "*res judicata*," and I feel a strong confidence that no case will be found at variance with it. "Moreover the conclusive effect is limited to the actual point decided—it does not extend to any matter which came collaterally in question, though within the jurisdiction of the Court; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument unless *perhaps by necessary inference from the judgment*."(a) Nothing, too, is clearer than the proposition that for the purposes of such inference it is not permissible to examine the proceedings of a trial and to infer that because particular evidence was adduced and the judgment or verdict was in opposition to the evidence, that the evidence is therefore trustworthy or untrustworthy as the case may be.

This is not only not a necessary, but it is not a permissible inference. The consequences of such a doctrine are almost sufficient to shew it wholly untenable, and it is plain that it is in opposition to all the authorities. I am quite clear therefore that the doctrine of *Eastmure* v. *Laws* is wholly inapplicable to this matter, and for the simple reason that the precise issue was not whether this document was true, but whether the plaintiff's demand was included in an account stated. The truth or falsehood of this document was, in the only sense in which the word is applicable to the present subject-matter, not an issue at all.

I am quite clear therefore that the defendant should not have been considered estopped from disputing the execution of this document. I am also clearly of opinion that in treating this document, even if executed, as possessing all the mysterious properties attaching to a deed, there has been further a more serious error. Happily for the administration of justice we know nothing of specialties, and in the country of their origin this would not be one. The indispensable sealing has not been gone through. It is at the utmost a

(a) Best on Evidence 2nd ed. p. 697. The corresponding passage in the third edition (1860) of *Best on Evidence* is: "Moreover the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question. It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself though not then directly the point at issue." *Reg.* v. *Hartington Middle Quarter*, 4 E. & Bl. 780, 794 per Coleridge, J.

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document not under seal evidencing an account stated, and it is quite clear that such an account is not conclusive evidence of a debt due, for it is clearly open to the defendant, even under the general issue, to show a gross error or mistake in the accounts, or that he made it under a misapprehension of facts, and for the reason satisfactorily given by Alderson B. in *Thomas* v. *Hawkes*(*a*): "It cannot be contended that from the mere statement of an account a debt arises. The averment of the declaration is not merely that an account was stated, but that the defendants were indebted upon it. * * * * * * They [the defendants] were entitled therefore, under the general issue to shew that the account did not shew them to be indebted, because it was not correct." Even if, therefore, as to the statement and rendering of this account the defendant was estopped, he would by no means have been estopped from disputing its items.

If therefore any substantial alteration in the decision could result, I think that we should be bound to send this case for further enquiry, for the Civil Judge seems to me clearly wrong as to both points on the issue of law. I find, however, that in this case the defendant has alleged that he has actually returned the jewels as the disputed document requires him to do. It is quite clear that no Court could believe any amount of oral evidence which he could adduce as against his own conduct, and being satisfied of the result at which with such allegations before it the Court below and this Court must come as to the execution of this document, I would dismiss the appeal, but make no order as to costs.

FRERE, J.:—I concur in the opinion that the conclusion at which the Civil Judge has arrived with respect to the execution of the account B must be pronounced substantially correct. I would accordingly affirm his decision, but would charge the parties with their respective costs in the appeal, as proposed by my Brother Holloway.

Appeal dismissed.

(*a*) 8 M. & W. 140, and see *Perry* v. *Attwood*, 6 E. & B. 691.

Appellate Jurisdiction (a)

Regular Appeal No. 27 *of* 1862.

RA'MAKRISTNAÇA'STRULU......................*Appellant.*

DARBA LAKSHMIDEVAMMA and others...*Respondents.*

A suit for ina'am lands was instituted in 1849, the cause of action having accrued nearly twelve years before. The suit was dismissed on the ground that the plaintiff had no certificate as required by Reg. IV of 1831. Eight years afterwards the plaintiff having obtained the requisite certificate, commenced a suit for the lands:—*Held*, affirming the decree of the Civil Judge, that the institution of the former suit had not suspended the statute of limitations, and that the plaintiff was therefore barred.

1863. *April* 18. *R. A. No.* 27 *of* 1862.

THIS was a regular appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 23 of 1861. The plaintiff sought to recover a share in certain ina'am lands, of which the foster-mother of the first defendant wrongfully took possession on the 2nd of July 1837. The plaintiff on the 3rd March 1849 instituted a suit in the Court of the Şadr Amín of Masulipatam, and obtained a decree which, in *Appeal Suit No.* 36 *of* 1852, was reversed by the Şadr Court on the ground that in the absence of a certificate from a Secretary to Government the suit was not cognizable by a civil tribunal. The plaintiff subsequently obtained the requisite certificate, and instituted Original Suit No. 23 of 1861 in the Civil Court of Masulipatam, when a question was raised as to whether his claim was not barred by the statute of limitations. "This," said the Civil Judge, "depends on whether the institution of Original Suit No. 100 of 1849 and the fact of the Şadr Amín having passed judgment in that action are of themselves sufficient to keep the cause of action alive; and I am of opinion that they are not, either in law or equity. The plaintiff did institute the above action, but having omitted to obtain a certificate, the Court's jurisdiction was barred by Regulation IV of 1831*(b)* (extended by Act XXXI of 1836);

(a) Present Frere and Holloway, J J.

(b) "First. The Courts of 'Adálat are hereby prohibited from taking cognizance of any claim to hereditary or personal grants of money or of land revenue, however denominated, conferred by the authority, of the Governor in Council in consideration of services rendered to the State, or in lieu of resumed offices or privileges, or of zamíndárís or palaiyams forfeited or held under attachment or management by the officers of Government, or as a yaumiá or charitable allowance, or as a pension, and

and [as] the mere fact of a suit being instituted in a court by which under the circumstances it was not cognizable, would not keep the cause of action alive, the statute of limitation would commence to run from the date on which the cause of action arose, viz. 2nd July 1837, and the suit in point of law would be barred by lapse of time."

1863. *April* 18. *R. A. No.* 27 *of* 1862.

Tirumalácháryár for the appellant, the plaintiff.

Rangayya Náyuḍu for the respondent, the first defendant.

FRERE, J.:—This suit was instituted for the recovery of a share of ina'am lands, of which the defendants are said to have taken wrongful possession.

The Acting Civil Judge dismissed the claim on the ground that according to the plaintiff's own statement in a former suit instituted by him on the same subject, No. 100 of 1849, the cause of action arose so far back as the year 1837. This suit of 1849 was finally dismissed in appeal in the year 1853, on the ground that the lands being ina'am, the jurisdiction of the Court was barred by Regulation IV of 1831, and Act No. XXXI of 1836. The Acting Civil Judge held, however, that the term for which this suit was pending could not be allowed to the plaintiff in calculating the period of twelve years under the law of limitation, and that the statute must be considered to have commenced running from the year 1837.

The plaintiff has now appealed from this decision.

It appears that the plaintiff eight years after the date on which he was non-suited in the suit of 1849 on the grounds already mentioned, instituted the present action with the accompanying certificate prescribed by Regulation IV of 1831. We are however, clearly of opinion, with the Acting Civil Judge, that the irregular institution of a suit in the year 1849 forms no bar to the operation of the ordinary law

also of any claim for the recovery or continuation of, or participation in, such grants, whether preferred against private individuals or public officers, unless the plaint is accompanied by an order signed by the Chief or other Secretary to Government, referring the complaining party to seek redress in the established Courts of 'Adálat.

Second. The power to decide on such claims is reserved exclusively to the Governor in Council, after due investigation by such persons and in such manner as he may deem fit."

1863. April 18. R. A. No. 27 of 1862.

of limitation as against the plaintiff. We accordingly affirm the original decree and dismiss the appeal with costs.

HOLLOWAY, J.:—The plaintiff had a complete cause of action in 1837. The fact that he failed to obtain the required certificate will no more suspend the statute than the inability to procure evidence would have done. The statute is a statute of peace, and is to be liberally construed. Here, however, it is quite manifest that much more than twelve years have run against the plaintiff's remedy. That the certificate was not procured may be from the plaintiff's misfortune or from his negligence, but with that the Court has no concern.

This case really proceeds on the very obvious principle that a plaintiff's failure to procure what is necessary to the institution of his suit does not keep alive a cause of action. The cause of action accrued in 1837, and even allowing for the time occupied by the former suit, the remedy was barred unless the frivolous excuse was to be admitted. Of course there is the point that through the plaintiff's laches the former suit was no suit at all: but no opinion is expressed upon that.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 31 *of* 1862.

UDAYA VARMA and others............*Appellants.*

NA'YAR CHAMBITHU and others......*Respondents.*

Where the plaint, in a suit to establish a right to landed property and to recover arrears of rent, alleged no specific acts of ownership since 1845, but contained a statement general enough to let in evidence of such acts, and it did not appear that the plaintiff had been questioned:—*Held* that the plaint should not have been rejected under sec. 32 of Act VIII of 1859 on the ground that it appeared to the Court that the right of action was barred by lapse of time.

1863. April 27. R. A. No. 31 of 1862.

THIS was a regular appeal from the decree of R. Chatfield, the Civil Judge of Mangalúr, in Original Suit No. 3 of 1861. The suit was brought to establish the plaintiffs' right as proprietors and hereditary mukhyasthans to the devasthána of the pagoda of Kshetrapala, and also to re-

(a) Present Scotland, C. J. and Frere, J.

cover arrears of rent from the defendants, who had been in possession of the pagoda-estates. The defendants brought a cross-suit in 1860 to establish their title to the estates as hereditary mukhyasthans, which had not been disposed of at the date of the present suit.

In 1845 disputes regarding the right to the pagoda-property commenced, and thereupon the then arasus were ordered by the Assistant Collector to establish by a civil suit their right, if any, to the property in question. On appeal to the Principal Collector this order was confirmed in 1845; but the arasus did not take any steps to protect their interests till 1860, when a suit was instituted by the defendants to establish their right to the office of mukhyastans of the pagoda. Thereupon the plaintiffs presented Petition No. 492 of 1861, which had not been disposed of at the date of filing the plaint, and afterwards brought this suit, which was dismissed by the Civil Judge.

The Civil Judge's decree contained the following passage:

"In the opinion of the Court this present suit must be summarily rejected under section 32 of Act VIII of 1859, as more than fifteen years have elapsed since in 1845 disputes regarding proprietary rights commenced, and the then arasus were directed by the Assistant Collector to establish any personal or hereditary claim to the property of the pagoda by a civil suit. On appeal this order was confirmed by the Principal Collector in 1845, but the arasus omitted to take any steps to protect their interests until alarmed by the suit instituted in 1860, by the defendants, to establish their right by hereditary succession to the office of mukhyastan. In 1851, Mr. Maltby, the Collector, referred to this order of his predecessor as if for the express purpose of attracting their notice and defining the position they occupied, viz., that the arasus were *nominated* additional mukhyastans with the assent of the proprietors, and in consideration of their character and position, and not from any inherent right of their own. And if the plaintiffs are correct in their assertion that the three first defendants have no title to the dignity, and never were mukhyastans, they cannot be sued for arrears of rent, &c. from property never in their possession, or under their control."

1863. April 27. R. A. No. 31 of 1862.

Branson for the appellants, the plaintiffs, contended that the suit was not barred, and that the law of limitations did not apply.

Mayne (*Tirumaláchàriyár* with him) for the respondents, the first, second and third defendants, referred to section 32 of the Code of Civil Procedure, which enacts that "If upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so."

SCOTLAND, C. J. :—Having heard this case fully discussed, we may at once state our judgment. The question is whether the case as it appeared before the Civil Judge, when the plaint was presented, warranted his deciding *in limine* that the cause of action was barred and rejecting the plaint. Now, though the 32nd section of the Code of Civil Procedure should be given its full effect when the case comes clearly within its provisions, still the power it gives of concluding the right to sue, subject to appeal, by rejecting the plaint, is one that requires to be very carefully exercised. On the one hand, the power thereby bestowed upon the Court of considering at the outset whether the law of limitation bars the suit may have the effect of preventing objectionable litigation and of saving considerable expense; but, on the other hand, unless that power be carefully exercised, the Judge may, upon mere partial preliminary statements, form an *ex parte* opinion not warranted by a full knowledge of the facts. The provision contained in that section is as follows :—[His lordship here read it]. Now looking at the plaint itself in the present case, it cannot be doubted that although no specific acts of ownership as proprietors are alleged, yet that the general statements which it contains are enough to let in evidence at the hearing of such acts since 1845 in exercise of the right claimed by the plaintiffs. What would have appeared in this respect if the Civil Judge had, as he might have done, required the plaint to be amended, we have before us no means of saying, neither can we form any opinion as to whether or not at the hearing anything will be proved to prevent the lapse of time being a bar. Dealing simply with

the statements in the plaint as presented, I think this is not a case in which it appears on the face of the plaint that the right of action is barred by lapse of time within the meaning of the 32nd section, so as to warrant the rejection of the plaint on that ground. The section, it is true, also gives the power of rejection after questioning the plaintiff, but we have nothing before us to shew, nor is it alleged, that the plaintiff was questioned. All that appears out of the plaint affecting the plaintiff is the Collector's certificate, to which we suppose the Civil Judge referred under section 138 of the Code of Civil Procedure. We cannot therefore say whether in this respect anything appeared to warrant the rejection.

The plaintiffs may, consistently with what is stated in the plaint, be able to shew acts of control of the property and affairs of the pagoda since 1845. It seems admitted that they have done acts as mukhtasars, and so far as appears it is rather prejudging the case to say that their only acts have been acts done not as owners, but merely as mukhtasars. I am therefore of opinion that the case is not brought within the provision of section 32 of the Code, and that the order of the Civil Judge must be reversed and the case sent back to be heard on the merits.

FRERE, J. concurred.

Case remitted.

Appellate Jurisdiction (a)

Special Appeal No. 34 of 1862.

VALLINA'YAGAM PILLAI..................*Appellant.*
PACHCHE' and others....................*Respondents.*

A Hindú may make an alienation of his property to take effect after his death.

The Hindú law in Madras admits of the testamentary disposition of property whether ancestral or self-acquired.

The testamentary power of a Hindú in Madras is co-extensive with his independent right of alienation *inter vivos.*

Semble, that a Hindú's will would not be invalidated merely by its omitting to provide for his widow.

Narrainasvámi Chetti v. *Arunáchella Chetti* approved.

Sonatun Bysack v. *Sreemutty Juggutsundree Dossee* observed upon.

Special Appeals No. 65 *of* 1844 and *No.* 447 *of* 1861 overruled.

1863. *Feb. 2, April 27.* *S. A. No. 34, of 1862.*

THIS was a special appeal from the decision of Kristnasvámi Ayyá, the Principal Sadr Amín of Tinnevelly, in Appeal Suits Nos. 498 and 499 of 1861. The original suit, No. 866 of 1860, out of which these two appeals arose, was brought before Arunáchalam Ayyá, the District Munsif of Srí Vaikundam ta'aluk, zila' Tinnevelly, to recover certain lands which the plaintiff claimed as devisee under a will in Tamil, dated the 29th of August 1859, of which the following is a translation:

I, Vaikundam Pillai, son of Muttanáyagam Pillai, residing at Kottirakurachi of A'rumugámángalam in the ta'aluk Srívaikundam, make on this 15th A'vani of 1315, corresponding to the 29th August 1859, according to my predetermination, the following testamentary arrangement (*maranasádanattinér'rpádu*) for the enjoyment of all my moveable and immoveable properties, &c., after my death, because I have no male issue and am stricken with disease and uncertain of life, as follows:—

1. Agreeably to the custom of the Vellálans at A'rumugamángalam, my sisters' descendants are entitled to my properties, I have accordingly given all my real and personal properties and assets, debts, &c., to Vallináyagam Pillai, son of my sister's daughter, and he is furthermore entitled to the estate under Hindú law. Neither my kinsmen nor my surviving wife has any interest in it.

(a) Present Scotland, C. J. and Holloway, J.

1863. Feb. 2, April 27. S. A. No. 34 of 1862.

2. After the death of Nágámani, mother of the said Vallináyagam Pillai, he obtained her strídhana and his paternal estate by a lawsuit. Subsequently the said Vallináyagam Pillai, together with the said property, I took under my protection, and made him live in my house: he was married at my expense, and we both enjoy all the properties jointly, and I now have delivered over to him the whole of my estate.

3. Because the funeral of the deceased Nallakannu, my first wife, was performed by the said person, and because he has hitherto acted according to my wishes, he is solely entitled to the performance of my obsequies and to inherit my estate after my death.

4. While in full possession of my senses, I have given of my own accord the real and personal properties, and my right of enjoyment, &c., and the documents relating thereto, to the said Vallináyagam Pillai, and he has received and accepted the same. Hence he holds full right to enjoy them from generation to generation, as long as the sun and moon endure, with power of alienation by gift, sale or otherwise.

5. I have prepared an inventory and given it to Vallináyagam Pillai with my signature, authorizing him to redeem such part of the property which I have given to him as has been mortgaged by me to repay loans for which I have given acknowledgments, and collect the debts which are owing to me. Hence none but he has any interest or right in respect of these matters.

6. Finding my second wife Pachché behave badly and act against my will, I have for some time put her away and allowed her maintenance. She having asked me through mediators to provide for her maintenance and lodging after my death, I offered to pay her a certain sum of money in full of all demands according to the custom of our caste: but she represented that ready money might be lost. I have therefore resolved to allow her every year during her life two cloths and six kóttais of paddy for her maintenance from the produce of chir'r'áru-padugai nañjey land measuring ten markals and five measures in Nandiyirulan Kattalai irrigated by Ariyappan head-sluice, and to build for her residence a house in a space of 3¾ grounds situated in the eastern side of the Pattirakáliyamman pagoda. I have accordingly given instruc-

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tions to Vallináyagam Pillai. The said Pachché shall only receive the above (allowance) from the said person, but she has no right to any other property.

7. Having thus appointed Vallináyagam Pillai heir to my property, so as to leave no room for obstruction or fraud after my decease, and also provided for the maintenance of Pachché my second wife, I shall, in order to prevent Vallináyagam Pillai doing any injury to the said Pachché or the latter asserting any [claim] to my property after my death, prepare and send a petition under my hand, together with the report of the karaṇam and other mírásídárs, through a vakíl, to the ta'aluk, referring briefly to the said arrangement, and soliciting that the possessory right in respect of property (paying revenue) which is entered in my name, may be transferred to that of Vallináyagam Pillai.

8. The said Vallináyagam Pillai is to abide by the above arrangements. I have executed this will for the present on an ólai ('palmleaf') in my own writing, and in presence of the undersigned witnesses*(a)*, so that no false claims and objections can be raised by others after my death. I shall purchase a stamped paper and have this will engrossed on it.

by VAIKUNDAM PILLAI,"

[Here follow the signatures of four witnesses.]

There was no finding as to whether the lands were ancestral or self-acquired. The plaintiff was the testator's fosterson and grandson of his sister, but not in the line of his heirs. The testator died on the 25th October 1859 *sine prole*, and was the sole surviving male member of his family. But he was survived by his widow, the first defendant. On the testator's death the plaintiff took possession of his property and held the same until 1860, when he was ousted by the first defendant and her father the second defendant. The plaintiff now sued to recover this property. The District Munsif held that an issueless man was under the Hindú law competent to alienate his estate, citing T. L. Strange's *Manual* § 151*(b)* and 6 Moo. I. A. Ca. 309

(*a*) A Hindú's will need not be attested, *Muncherjee Pestonjee* v. *Narayen Luxmon*, Bomb. H. C. Original Side 13th August 1863, reported in the Gazette, September 1, 1863, and see *Mt. Jiookoomvur* v. *Mt. Jhunkoo* 1 Borr. 202, 1 Morl. Dig. 618. Secus in the case of Europeans: *Gardiner* v. *Fell*, 1 J. & W. 22.

(*b*) "151. A man without male issue may alienate his immoveable property, whether ancestral or self-acquired, at will, to the prejudice of all other heirs."

and that a will might be confirmed so far as it was consistent with Hindú law and the rest of it set aside (Regulation V of 1829; Elberling *Inheritance* § 289). He accordingly decreed for the plaintiff, observing, however, that "the provision made in the said will for the maintenance of the first defendant is sufficient for a widow in ordinary life, but not for the first defendant, who is still young, and who should employ a servant and others." On appeal this decree was reversed by the Principal Ṣadr Amín, who held the will invalid under Hindú law, and relied on T. L. Strange's *Manual of Hindú Law*, sections 182, 183*(a)* and the fatwás of the paṇḍits of the late Ṣadr Court, dated respectively the 19th of July 1852 and the 23rd October 1853.

Branson (*Saḍagópáchárlu* with him) for the appellant, the plaintiff.

First, as to the law before Regulation V of 1829. It is clear that a Hindú in the position of the testator, without issue and the sole surviving male member of his family, might alienate inter vivos his property, whether ancestral or self-acquired, Strange's *Manual of Hindú Law* § 151; and in *No.* 3 *of* 1824 par. 32*(b)*, the late Madras Ṣadr Court was of opinion "that under the Hindú law a man is authorized to dispose of his property by will, which under the same law, he could have alienated during his survivorship, by any other instrument." That was a case of ancestral property. *Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row(c)* decides that a zamíndár having no issue is capable of alienating by deed or will, a portion of his estate which in default of lineal male issue would vest in his wife. [SCOTLAND, C. J. :—That was a case of self-acquired property. It appears at p. 56, from the case put to the Paṇḍits, that it was a village bought by the zamíndár at a public auction.]

(*a*) "182. A man may in his lifetime alienate his property to the prejudice of his widow, leaving her the means of maintenance: but he cannot make arrangement that such alienation shall take place after his death, since his widow would be entitled to what he died possessed (Ṣadr 'Adálat Paṇḍits 19th July 1852).

"183. It follows that there is no opening for the operation of a Hindú will. The assignment not completed during life by transfer and acceptance, is no gift; and after death the law of inheritance at once exerts its power."

(*b*) 1 Select Decrees pp. 438, 449. (*c*) 2 Moo. I. A. C. 54, 58.

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Regulation V of 1829, far from invalidating Hindú wills, expressly recognises them so far as they may conform to the Hindú law. Section 4 enacts that "wills left by Hindús within the territories of this Government shall have no legal force whatever, except so far as their contents may be in conformity with the provisions of the Hindú law according to the authorities prevalent in the respective provinces in this Presidency. Such wills, are not mere nullities, Ṣadr Proc. 26th November 1829 : Ibid. 10th December 1832. In *Nárayaṇasvámi Cheṭṭi* v. *P. Arunáchala Cheṭṭi*, a decision in the late Supreme Court upholding the will of one Pálayan Kistnama Cheṭṭi, of which there is only a newspaper report by the late Master Teed, it was held that self-acquired property might be bequeathed : Proceedings of Ṣadr Court 4th October 1847 : *Regular Appeal No.* 35 *of* 1859*(a)* [SCOTLAND, C. J. :—In that case the Court went on the ground that the instrument, though called a will, was not one.] *Special Appeal No.* 67 *of* 1861, rejected 20th November 1861 : *Special Appeal No.* 656 *of* 1861*(b)*. [HOLLOWAY, J. :—That is no authority either way.] *Doe d. Munnoo Loll* v. *Gopee Dutt(c)*, *Doe d. Juggomohun Roy* v. *Sreemutty Neemoo Dossee(d)*, *Soorjeemoney Dossee* v. *Denobundoo Mullick(e)*, [SCOTLAND, C. J. referred to *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick(f)*. *Branson :* That case has been frequently overruled by the late Madras Ṣadr Court]. *Sonatun Bysack* v. *Sreemutty Juggutsundree Dossee(g)*, *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty(h)*, in which case the Privy Council says*(i)*, "It must be allowed that in the ancient Hindú law as it was understood through the whole of *Hindustan*, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown ; and it is stated by a writer of authority (Sir Thomas Strange) that the Hindú language has no term to express what we mean by a will*(j)*. But it does not necessarily follow that what in effect, though not in form, are testamentary instruments, which are only to come into operation and affect property after the death of the maker of the

(a) M. S. D. 1860 p. 115.
(b) M. S. D. 1862, p. 75.
(c) Morton ed. Montr. 290.
(d) Clarke's Rules and Orders Sup. Court Calcutta, p. 105.
(j) The Tamiḻ word is மரணசாஸனம் *maraṇasâdanam*.
(e) Tayl. & Bell 341.
(f) 6 Moo. I. A. Ca. 226.
(g) 8 Moo. I. A. Ca. 66.
(h) 6 Moo. I. A. Ca. 309.
(i) 6 Moo. I. A. Ca. 344, per the Right Hon. T. Pemberton Leigh.

instrument, were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout *Bengal* a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the judicial authorities in *Calcutta* as well of the Supreme as of the Ṣadr Court. No doubt the law of *Madras* differs in some respects, and, amongst others, with respect to wills from that of *Bengal.* But even in *Madras*, it is settled that a will of property, not ancestral, may be good; a decision to the effect has been recognised and acted upon by the Judicial Committee, and indeed the rule of law to that extent is not disputed in this case."

Mayne (with him *Miller*) for the respondent.

First. A series of authorities in the late Ṣadr Court of Madras have established the invalidity of a will in a case like the present. Secondly, the present case is distinguishable from the Privy Council decisions. Thirdly, the will is bad as not providing sufficiently for the testator's widow.

As to the first point, in *Special Appeal No.* 74 *of* 1851*(a)*, a will in favour of the testator's foster-son was held bad: see, too, *Special Appeal No.* 23 *of* 1851*(b)* and cases there cited. The Hindú law merely allows of alienation with immediate possession and does not permit an alienation which is only to take effect after the alienor's death. The only case where a will is valid is where the property comprised in it is given to the very persons on whom it would have devolved legally had there been no will.

[SCOTLAND, C. J.:—According to Mr. Justice Strange "a man may bequeath by will what he could make gift of in life. It is to this extent that the power of bequest has been allowed*(c)*."]

Secondly, the Privy Council decisions are distinguishable. In *Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row(d)*, the devise was merely a confirmation of a gift previously made by a man having no lineal heirs.

(*a*) M. S. D. 1852, p. 60.
(*b*) Ibid. p. 111.
(*c*) T. L. Strange's *Manual of Hindú Law*, 1st ed. p. 32.
(*d*) 2 Moo. I. A. Ca. 54.

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The mere fact of there being a will did not entitle the heir to turn out the devisee or donee on the ground of its invalidity. *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty(a)*, goes farther. There was no gift followed by possession. [SCOTLAND, C. J.:—As regards the limitation of the testamentary power there seems to be a clear distinction between the case of a co-parcener and that of a widow. It has often been stated that a Hindú cannot dispose of property by will when he has a son, because the son immediately on his birth becomes a co-sharer with his father, and his title overrides the testamentary power. But a widow during the life of the husband can hardly be said to possess more than a right to maintenance. You cannot say she is, like the son, entitled to an estate or interest in the corpus.] In *Nagalutchmee Ummal's* case, the Privy Council went wholly on the opinion of the paṇḍits, which, as appears from *Special Appeal No.* 447 *of* 1861(*b*) was afterwards retracted on the difference being pointed out to them, between alienation with transfer of possession in the party's lifetime and testamentary disposition by will to take effect after death. [SCOTLAND, C. J.:—There can be no doubt that wills were not known to the old Hindú law(*c*). But the question is whether they may not now be made consistently with that law? Their beneficial influence in stimulating the circulation of property and quickening the stagnation of Hindú society is probably not doubted.] In *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*(*a*), the point as to the property not being ancestral was not noticed.

Thirdly. In *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee(e)* the Court set aside so much of the will as operated to bar the right of a widow of one of the testator's sons. In *Special Appeal No.* 352 *of* 1860*(f)* a will made during the lifetime of the widow of the son of the testatrix was held invalid. And in *Special Appeal No.* 3 *of* 1861(*g*) it was held that a testator could make no will to the prejudice of his

(*a*) 6 Moo. I. A. Ca. 309, S. C. before the late Ṣadr Court M. S. D. 1851, p. 226.
(*b*) Sloan's Judicial and Land Revenue Code i. 443 § 12.
(*c*) "In Hindú law there is no such thing as a true will. The place filled by Wills is occupied by Adoptions." H. S. Maine's *Ancient Law*, chap. VI.
(*e*) 8 Moo. I. A. Ca. 165.
(*f*) M. S. D. 1861, p. 67.
(*g*) M. S. D. 1861, p. 147.

widows. *Special Appeal No.* 447 *of* 1861*(a)*. [SCOTLAND, C. J. :—It was there said that the Privy Council in *Nagalutchmee Ummal's* case went on the opinion of the paṇḍits which they had since retracted, If indeed the Privy Council *had* gone solely on that opinion, there might be something in the observation. But all the cases and regulations were cited before the Privy Council, and, if I may say so, the decision was most satisfactory.]

In the cases before the Privy Council, reported in the second and the sixth volumes of Moore, ample provision was made for the testator's widow: in the present case the testator's will merely contains a direction to give his widow two cloths a year and six kóṭṭais of paddy, and this has been found insufficient. If a will does not provide sufficient maintenance for the testator's widow it is bad in part, and if bad in part it is bad *in toto*.

[SCOTLAND, C. J. referred to *No.* 3 *of* 1824*(b)*.

Mayne. That case was decided before Regulation V of 1829 was enacted.

SCOTLAND, C. J.:—That does not alter the question much. That Regulation is rather enabling than disqualifying. It would have been absurd to make such a Regulation if a Hindú will were merely waste paper.]

Branson replied. In *Special Appeal No.* 74 *of* 1851*(c)* the testator merely attempted to constitute a foster-son

(*a*) Not reported save thus, in a note in Sloan's *Judicial and Revenue Code*, I. p. 443 : "In this case the circumstances were exactly like those in the case before the Privy Council. Petitioner's divided cousin died leaving a widow pregnant, and made his will in favour of petitioner, providing for widow and child, if daughter, and if son, bequeathing the whole to son. If daughter to get her married and a portion for her. The widow to enjoy for life and after her death, in default of son, estate to descend to petitioner. In special appeal the above case was relied on. Decision by Court (Messrs. Strange and Frere). "We reject this appeal. The Privy Council go wholly on the opinion of the paṇḍits, which they (the paṇḍits) have since retracted on difference being pointed out to them between alienation with transfer of possession in the party's lifetime and testamentary disposition by will to take effect after death." Special Appeal No. 447 of 1861, 3rd August 1861, extracted from Mr. Branson's Manuscript Notes. In a miscellaneous case, in every respect precisely similar to that noticed in No. 11 [*Ramtoonoo Mullick* v. *Ramgopaul Mullick* 1 Morl. Dig. 39, 615 affirmed 1 Knapp 245] which was relied on as an authority, the Court followed the latter ruling. Civil Petition No. 225 of 1861, 31st August 1861, Messrs. Phillips and Frere. (Vide note 2.)"

(*b*) 1 Sel. Dec. 438. (*c*) M. S. D. 1852, p. 60.

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(which relationship Hindú law does not recognise) and make a will accordingly. [HOLLOWAY, J.:—The devisee in that case could not take as foster-son: therefore he took nothing: that is the effect of *Special Appeal No.* 74 *of* 1851]. *Special Appeal No.* 23 *of* 1851 merely decides that a Zamíndár's will, which purports to confer upon his widow a beneficial interest more than a suitable maintenance, is void as against his adopted son. In *Mulraz Lachmia's* case(*a*), there was no gift before the testator's death. In *Special Appeal No.* 352 *of* 1860, the testatrix, the widow of the plaintiff's paternal uncle, had adopted a son whose widow was alive when the will was executed. *Special Appeal No.* 3 *of* 1861 was an *ex parte* case. In *Special Appeal No.* 299 *of* 1861, the testator had sons, and could not therefore without their consent devise any part of his immoveable property. In *Nagalutchmee Ummal's* case maintenance was amply provided. Here the provision is scanty. But where are you to draw the line? In *Sonatun Bysack's* case the maintenance was insufficient, but the will was not therefore set aside. See 8 Moo. I. A. Ca. 87.

The testator having no male issue had entire dominion over his immoveable property, whether self-acquired or ancestral. [SCOTLAND, C. J.:—There is no finding whether or not the property in the present case is ancestral or self-acquired; but the presumption is that it is ancestral.] If he had entire dominion over the property he might well devise it.

Cur. adv. vult.

On the 27th of April the judgment of the Court was delivered by

SCOTLAND, C. J.:—This is a special appeal against the decree of the Principal Ṣadr Amín, reversing, upon appeal, the decree of the District Munsif; and the question which we are now called upon to decide is, whether or not the instrument in writing found to have been executed by Srí Vaikuṇḍam Piḷḷai deceased, on the 27th August 1859 in favour of the plaintiff (the special appellant), has, under the circumstances of this case, a valid operation, in law, as a will. We are of opinion that our judgment must be in the affirmative.

(*a*) 2 Moo. I. A. Ca. 55.

The material facts we must take to be that the plaintiff is the maternal grand-nephew of the deceased Srí Vaikuṇḍam, and was living with him at his death, and upon his death, entered upon the possession and enjoyment of the property left under the will, and so continued until dispossessed by the first and second defendants. That Srí Vaikuṇḍam died without having had any issue, and leaving, so far as appears, a widow (the first defendant) his only other surviving relation. As to the *factum* of the will there is no doubt, and it contains an express provision for the maintenance of the first defendant, as the deceased's widow; and this provision the District Munsif considers in his judgment to be sufficient for a widow in ordinary life, and there is nothing stated to the contrary in the judgment of the Principal Ṣadr Amín. What the District Munsif adds as to the extra allowance that he thinks required by the *youth* of the widow and for the *consequent* employment of servants and others, cannot, we think, be regarded upon the present question as qualifying the effect of his finding in respect of the sufficiency of the maintenance provided for by the will.

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The Principal Ṣadr Amín has very properly dealt with the written instrument as a will and not as a gift *inter vivos*. It is clear that the plaintiff acquired no title or interest of his own in the property until after the death of Srí Vaikuṇḍam; and he must fail in the suit if the instrument has no legal validity as a will, or,—to state more generally the point involved in the case, and upon which the judgment of the Principal Ṣadr Amín rests,—if by law a Hindú cannot make an alienation of his property to take effect after his death. That the text-books, commentaries, and digests of the Hindú law nowhere directly recognize the disposal of property by a will to take effect after death, and that its varied rules as to inheritance and succession to property seem all opposed to the exercise of such right, are now accepted facts supported by the concurrence of numerous authorities. But, notwithstanding this, it is also an undoubted fact that for many years wills have been very generally adopted and in use amongst Hindús in this as well as the other Presidencies, and have been given effect to by the Courts of Justice, and by the course of decisions in Bengal to a very wide extent under the school of law prevailing there.

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In the late Supreme Court of Madras, the cases in which testamentary dispositions of property have been held valid and given effect to, and the whole course of practice of the Court, have for some time put it beyond question that, so far as its local jurisdiction (now that of the High Court) extended, a Hindú might make a valid alienation by will. Whilst Sir Thomas Strange was Chief Justice, the question of the validity of a will, so far at least as it disposed of self-acquired property, appears to have been raised, though not decided. But not long afterwards such a will was, it appears, held valid in the case of *P. Narrainsvámi Chetti and others* v. *P. Arunáchella Chetti and others*: see the first volume of that learned Judge's work on Hindú law, page 267 and page 268 note 2*(a)*. A printed copy of the judgment in that case (delivered on the 8th February 1832) from a manuscript note of the late Master in Equity, has been furnished to us by the learned counsel for the appellant, and from that it appears that the decision of the Court, after a review of previous decisions, was clearly in favour of the right to make a will disposing of self-acquired property, and in upholding the particular bequests in the will, the Court appears to have proceeded by analogy to what they considered to be the Hindú law regulating gifts *inter vivos*. Since this case it does not appear to have been doubted that a Hindú might dispose of property by will, and wills have constantly been admitted to proof, and effect given to the limitations and bequests they contained. There does not, however, appear to have been any subsequent decision of the Supreme Court upon the point of the *extent* to which the power of the disposal by will may be exercised.

Looking next to the decisions of the late Ṣadr Court of Madras, the two earliest seem to be *No.* 7 *of* 1823 and *No.* 3 *of* 1824*(b)*. The former was the case of ancestral property, and the Court held that it was not competent to dispose of the *whole* of such property so as to deprive an elder brother

(a) " Since the publication of the first edition of this work, the Supreme Court at Madras has sustained a will by a Hindú so far as the property conveyed by it, having been of the testator's acquirement, was bequeathed for the performance of religious ceremonies; considering it, even at that Presidency, to be too late to determine that a Hindú cannot make a will; and holding the one in question not to be liable to be deemed void, on the ground of its being superstitious.—*Ex relatione* Sir Ralph Palmer C. J."

(b) Ṣadr 'Adálat Select Decrees, pp. 406, 438.

of his right as legal successor. In the other case the title of the appellants claiming against the testator's widow depended exclusively upon the validity of the will, the property being self-acquired; and the Court upheld the validity of the will on the broad ground that "a man is authorized to dispose of his property by will which, under the same law, he could have alienated during his survivorship by any other instrument." Upon this ground these two decisions are quite consistent; and the fair effect of both as authorities, we think is that a Hindú might by will govern the disposition of his self-acquired property after his death; but that the power to do so could not be exercised beyond the power of gift or alienation which by law he possessed during his life. So far this is in accordance with the law as stated in the decision of the late Supreme Court. These seem to have been well-considered cases, and we cannot consider the decision in *No.* 65 *of* 1844(*a*), as affecting the authority of the later of the two cases. But, further, we find this view of the law was supported upon appeal to the Privy Council in 1838, in *Mulrauz Lachmia* v. *C. Venkata Ráma Jagganadha Row*(*b*).

Then the Regulation V of 1829, passed after the Ṣadr decisions just referred to, although expressed in somewhat obscure language, does certainly recognize the giving legal force and operation to Hindú wills as such; and to its provision as to conformity with Hindú law, greater effect cannot be given than that which decided cases warrant.

Had the case stood here, we should, probably, upon the weight of authority, so far, have formed the same opinion as we now do. But we have further a decision of the Court of appeal of last resort in the case of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty and others*(*c*), directly supporting the will in question. There the property was both ancestral and self-acquired, and the deceased left a daughter, but no male issue: the appellant (his widow) then pregnant, afterwards gave birth to another daughter. His other relations whom he maintained were a grand-mother and aunts. The will provided proportionately for the maintenance of the widow and daughters and the other female relations, and contained bequests to charitable purposes. The plaintiff's (ap-

(*a*) 2 Ṣadr 'Adálat Dec. 79. (*b*) 2 Moo. I. A. C. 54.
(*c*) 6 Moo. I. A. C. 309.

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pellant's) claim as heir was upon the ground, amongst others, that the deceased was utterly incompetent to dispose of the property by will. The Civil Judge took the opinion of the paṇḍits of the Ṣadr Court, and their opinion was that the will was "valid under the Hindú law," and accordingly he decided in favour of its validity. And in affirming this decision, the Ṣadr Court, in their judgment, say, that the Court had referred to all the authorities quoted by the appellant and found that although the opinions regarding wills of Hindús, generally, were conflicting, yet that the majority were against the argument of the appellant; and after citing the case of *Ramtoonoo Mullick* v. *Ramgopaul Mullick*(a), and referring to the distinct opinion given by the law-officers of the Court, they further observe that the argument of the appellant that the will was not recognizable under Regulation V of 1829, could not be sustained. A petition for a review of judgment appears to have been unsuccessfully presented. The case was afterwards fully argued before the Privy Council, and all the decisions and authorities as well as the distinction between ancestral and self-acquired property appear to have been referred to and discussed on both sides; and in the considered judgment of the Judicial Committee, their Lordships point out that the strictness of the ancient Hindú law had long since been relaxed; and after referring to the difference between the law in Bengal and that of Madras, they expressly recognize its being settled by the Ṣadr decision in No. 3 of 1824 and that of the Judicial Committee upon appeal in 1838 (*ante*), that in Madras a will of property not ancestral might be good, and affirm the decree, without however expressing any decision upon the general question as to the right to dispose by will, being co-extensive with the right of disposal by act *inter vivos*.

We have, then, the decisions of the highest Court of Appeal, establishing, in affirmance of the decrees of the Ṣadr Court, that the Hindú law in Madras does admit of the testamentary disposition of property both ancestral and self-acquired: the last decision is directly applicable to the circumstances of this case; and confirmed as well as governed in our opinion by its authority, we are clearly brought to the conclusion that the will in question is valid. It is

(a) 1 Morley, Dig. 39, Macn. Cons. H. L. 340: reported in 1 Knapp, 245

not necessary for us here to consider and lay down any general rule as to how far or under what other circumstances the law gives to a Hindú the power of disposal by will. But we may observe, that, now that the legal right to make a will is settled, there seems nothing in principle or reason opposed to the exercise of the power being allowed co-extensively (as stated in some of the cases, and forcibly urged in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*) with the independent right of gift or other disposal by act *inter vivos*, which by law or established usage or custom having the force of law, a Hindú now possesses in Madras. To this extent the power of disposition can reasonably be considered to be in conformity with the respective proprietary rights of the possessor of property, and of heirs and co-parceners, as provided and secured by the provisions of the Hindú law.

The late case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*(a) was relied upon by the respondent as a decision of the Judicial Committee opposed to the authority of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* and others, because the right there claimed by the son's widow as heir was upheld. But we think the effect of the decision is quite otherwise. It expressly recognizes and confirms the legal right to make a will (the extent of the power of disposition being regulated by the Hindú law;) and gives effect to the intention of the testator so far as it was to be ascertained from the terms of the will. In the judgment, it is distinctly stated as the ground of the decision as to the widow's right, that the will was silent upon the disposition of the property in the event of the death of a son leaving no issue male, and therefore the son's share was descendible to the heir to whom it would go in the absence of any provision made by the will. On behalf of the respondent we were further pressed with a very late Special Appeal case, No. 447 of 1861, in which the Ṣadr Court had come to a decision directly contrary to their former judgment and the decision of the Judicial Committee in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*. The only report of the case is a manuscript note of Mr. Branson and a note in *Sloan's Judicial and Revenue Code*, p. 443, and the sole ground of the decision seems to have been the retractation by the paṇḍits

(a) 8 Moo. I. A. C. 66.

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of their former opinion, upon being pointed out the difference between alienation in the party's lifetime and disposition by will. It is hardly to be supposed that the paṇḍits were not fully aware of this distinction, so often before referred to, when they gave their first opinion, and therefore difficult to see any safe ground for relying, so authoritatively and entirely as the Court seems to have done, on their altered opinion. Great confusion and uncertainty in the law, we fear, would be the result if the mere expression of a change in opinion by the native law-officers of the Court, were a sufficient ground for departing from the deliberate judgment of a last Court of Appeal. We are unable to regard the case as a satisfactory one, and are of opinion that no effect can properly be given to the decision as an authority against the validity of the will in the present case. It is not necessary to observe on the other not satisfactorily reported decisions referred to: but as to the cases at pages 67 and 147 of the Ṣadr decisions of 1862, we may say that the remarks, so far as we can gather, seem to be based upon there being no provision made in the particular wills, for the testators' widows. And as to this we would observe that it is unnecessary in this case to express, and we must not be supposed to have expressed, an opinion that a will otherwise valid would be rendered invalid by the omission of such a provision.

In accordance, then, with what we consider, upon the cases and the authority of the highest judicial decisions, to be now the law, our judgment is that the will in this case is valid, and that consequently the decree of the Principal Ṣadr Amín must be reversed. The case, however, is one in which the parties should, we think, respectively bear their own costs of the appeal.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 21 *of* 1862.

VIRDA'CHALA NA'TTA'N..................*Appellant.*

RA'MASVA'MI NAYKKAN and others.......*Respondents.*

The ascertainment of the amount of damages is a necessary preliminary to a decree under Act VIII of 1859, sec. 192 for specific performance of a contract and payment of damages as an alternative in case of non-performance.

The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases.

There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed: first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed; secondly, where there has been an agreement, which has come to an end, to carry on a joint adventure, and the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account.

Injunction granted to restrain a partner from excluding his co-partner from the partnership-business and from doing any act to prevent its being carried on according to the articles.

THIS was a regular appeal from the decision of E. W. Bird, the Civil Judge of Negapatam, in Original Suit No. 4 of 1862. The suit was brought by Rámasvámi Naykkan and two others against the appellant and another to compel specific performance of an agreement in Tamil, dated 21st June 1861, by which the parties contracted to work in partnership an ábkárí farm for the ta'aluks of Negapatam and Nánilám, which was to continue for five faslís from faslí 1271 (A. D. 1861). The following is a translation of the agreement :— 1863. *May* 11. *R. A. No.* 21 *of* 1862.

" *Kaul entered into between M. Rámasvámi Naykkan, K. Vairamuttu Pillai, Vélu Mudaliyár and Virdáchala Náttán, residing at Vilippálaiyan on the* 27*th June* 1861.

" As K. Virdáchala Náttán obtained in a public sale the lease of toddy and liquor in the two ta'aluks of Negapatam and Nánilám for five years from fasli 1271 to 1275 and gave it to us, the said four persons at ¼ pangu each, and as we accepted the same, the affairs thereof shall be transacted by each of us upon his own responsibility in the manner below described.

(a) Present Scotland, C. J. and Holloway, J.

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"Rámasvámi Naykkan should remain in the kachhahrí of the kasbá village of Vilippálaiyan and not only cause the money collected every day in the kasbá village, as also in Kílvélúr, Tiruvarúr, Nánilám and Kuduvásal, to be entered in the memo. of ready money collection after it is examined by the shroff, and a balance sheet completed for the same every night, but also keep it in the chest, and at the end of the month, prepare a tukkadi account showing the whole amount so collected. He should pay off the kist on the said two ta'aluks at the end of each month, and make payment to the establishment on the 5th of the following month. Honest and clever servants must be selected on examination for employment in the kasbá kachhahrí and in the godowns. The servants found guilty of fraud shall on proper enquiry be punished either by fine or by removal, as the crime may deserve, and new hands taken in their room. The said Rámasvámi Naykkan should also attend to the ready-money income and disbursement.

"Vélu Mudaliyár will have to remain with (him) and examine the memorandum of ready money collections made in the kasbá village and other places every day. He will also check the accounts kept by the shroff for the same, and sign the memos. of ready money, and of the amount collected and the balance-sheet which will bear the signatures of the kuruppu and kaiyédi varnams and of the shroff. Rámasvámi Naykkan also should sign every night the balance-sheet showing the amount in the chest under his custody.

"K. Vairamuttu Pillai and Virdáchala Náttán shall appoint servants to collect money in Kílvélúr, Tiruvarúr, Nánilám and Kuduvásal ta'aluks, and in so doing, they should select on examination clever, honest and trustworthy servants to be in the godown in the kasbá village of Nánilám. They shall give strict orders to the káryagárs, karnams and peons, who are appointed to collect money daily from the shops regarding the opening of the shops in the places mentioned in the list, and the purchase of jaggery and other ingredients to prepare liquor in the godown. The money collected in one day must be called for the following day in the local kachhahrí and as soon as all the collections are received, a particular memo. and balance-sheet must be prepared and checked once in two days and sent to the kachhahrí in the kasbá

village of Veḻippolyum. If the karyagárs, karnams and peons appointed for the collection of money shall be found guilty of fraud on proof, they may be punished by fine or removal as the crime may deserve.

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" Money should be received from the kachhahrí in the Vilyppolyam village one the 5th of every month, and distributed among the servants on account of their wages for the previous month on their signing the receipt prepared on a paper for all of them, and as soon as the payment is over, the said receipt will be forwarded to the ḳasbá kachhahrí here.

" The ready money collected in the ḳasbá village must at first be brought and entered in the accounts here, and then received for distribution among servants there. No payment whatever shall be made out of such collection there previous to the registry of the same in the accounts here.

" Muchalkás shall be obtained from persons having toddy and arrack shops under ámáni or Sarkár management according to the accompanying form, and forwarded to the ḳasbá kachhahrí hereof; documents should be obtained from the servants employed for the collection of money, and ready money security taken from the shroff. If these servants be found guilty of fraud in money affairs, an enquiry should be made into the matter, and if the fraud is proved, a report should be made of the same to authority who will punish the offender suitably."

On the 20th July 1861, in consequence of a default (for which none of the parties were to blame) in regard to the payment of the deposit-money for the Nánilám ta'aluḳ, the farm of the latter was re-sold by the Collector and purchased by the second defendant, one of the contracting partners in the document A. The first defendant by his answer admitted that the agreement had been entered into between the parties, but submitted that A had been cancelled by the re-sale by the Collector, on the 20th July 1861 of the ábkárí farm of Nánilám ta'aluḳs, and that consequently there had never been a partnership between the plaintiff, the second defendant and himself. The Civil Judge delivered a judgment from which the following is an extract.

1868. May 11. R. A. No. 21 of 1862.

"The question now arises whether this court can award the specific performance of the partnership contract sued for by the issue of an injunction, the duration of which must be four years and whether the court can, in a suit of this nature where neither a dissolution, nor a partnership settlement is sought to be enforced, award compensation to plaintiffs for the past, and probable future breach by the first defendant of his partnership-agreement with them.

"It is clear that injunctions of the nature now sought in partnerships for a fixed term have been repeatedly granted by the courts in England in similar cases. (See pages 54, 55, 56, &c., Collett on Injunctions). The court in the exercise of its jurisdiction as a court of equity appears bound to interfere to compel the first defendant to refrain from a continued fraudulent violation of his contract, which if permitted may lead to the ruin of the plaintiffs. The court therefore holds that the plaintiffs are entitled to a decree awarding them specific performance of the partnership agreement; the first defendant being restrained by an injunction from the future violation of his covenant with the plaintiffs.

"In regard to the damages claimed there is a greater difficulty. The plaintiffs are not entitled to sue, prior to the final adjustment of the partnership accounts or a dissolution, for the amount of profits they may have lost by the first defendant's breach of his partnership agreement with them. No accounts of the partnership have been adjusted; no balance struck, and under the present circumstances the court holds that the plaintiffs cannot legally or equitably claim for compensation for past damage alleged to have been sustained.

"Nor indeed does the court find any credible or authentic accounts or evidence on record which could afford material enabling the court to ascertain the amount of such damage said to have been sustained already by plaintiffs.

"The alleged future damages are even more uncertain and doubtful still. It is obvious that future profits on such partnership as that in issue cannot be calculated, with even the most remote degree of certainty; and that a thousand contingencies may arise (a tempest, a flood, a season of drought, pestilence, the death of the contractors, the first and

second defendant's) which may convert possible profits into absolute losses and even annul the partnership itself at any moment. 1863. May 11. R. A. No. 21 of 1862.

"The damages claimed therefore by the plaintiffs for past and future breach of the partnership-agreement cannot be granted by the court, in the shape in which they are claimed.

"The Court having decided that the plaintiffs are entitled to a specific performance of the partnership-contract as sued for, decrees the same accordingly against the defendants, and resolves to issue an injunction directing the first defendant to refrain from excluding the plaintiffs from the benefits of the partnership-agreement, and directing the said defendant to conform to the same in all particulars, the second defendant in the manner admitted by him before this court. And with reference to section 192 of the Code of Civil Procedure, the Court further directs that if the defendants or either of them fail to conform to their said agreement with the plaintiffs, they the said defendants or either of them do pay the plaintiffs as compensation the sum of rupees 15,000, fifteen thousand an amount which under all the circumstances of the case the court considers will be an equitable award as an alternative for the specific performance now decreed.

"The first defendant will pay all the costs of suit incurred by the plaintiffs. The second defendant is to bear his own costs."

Saḍagópácharlu for the appellant, the first defendant. First, the appellant's admission of the partnership was obtained under duress. Secondly, no consideration existed for the agreement.

Mayne for the respondents, the first and third plaintiffs, *contra*.

Saḍagópácharlu replied.

The Court delivered the following

JUDGMENT:—This suit was brought for damages for the alleged breach of a partnership-agreement and for the enforcing of the agreement.

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The first defendant (the appellant), among other objections, denied the existence of the partnership-agreement and of the amount of profits alleged to have accrued from the ábkárí contracts.

The Civil Judge found the partnership proved, decreed a specific performance of its articles, and by injunction directed that the defendants should not exclude the plaintiff from the benefits of the contract, and decreed that they or either of them should pay rupees 15,000 if they did.

There can be no doubt of the existence of a partnership in point of fact. It has been solemnly admitted by the first defendant himself, and no evidence whatever has been given of the allegation that the statement was made under duress. Questions which a public officer, authorized to ask them, put to the first defendant elicited his answers, and such questions can in no point of view be regarded as putting an illegal pressure upon the defendant. As to the argument that no consideration existed for the agreement, the mutual stipulations and promises are a sufficient consideration.

As to the defendant's allegation that in consequence of the difference between himself and the plaintiff, the old contract has been surrendered by him and a new one taken, it is plain upon the evidence here that this would be so obvious a fraud that it can furnish him with no defence to this action.

It is clear, however, that the alternative damages awarded must be disallowed. Section 192 of the Civil Procedure Code(a) applies to cases in which an action having been brought for damages for a breach of contract, the Court, with the assent of the plaintiff, decrees as an alternative that the contract be specifically performed. It is manifest that as a necessary preliminary to such a decree the amount of damages is to be ascertained. In this case, supposing the nature of the suit to admit of damages being recovered, there has not been the slightest evidence upon the point, and it

(a) This section enacts that "when the suit is for damages for breach of contract, if it appear that the defendant is able to perform the contract, the Court with the consent of the plaintiff may decree the specific performance within a time to be fixed by the Court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed."

would depend in a great measure upon an account of the partnership-transactions.

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There is another point upon which we think it necessary that the decree of the Court below should be modified, in order to avoid misapprehensions and difficulties that are likely otherwise to arise. Taking the judgment and decree together, the Civil Court appears to have decreed absolutely against the defendant specific performance of all the stipulations in the partnership-contract. This, we think, should not be decreed. Specific performance is a branch of the jurisdiction of the English Courts of Equity, not taken from the Roman law, and its application to partnerships is governed by precisely the same rules as those which govern it in other transactions. As is stated in a book of authority*(a)*, the natural remedy for a breach of an agreement to enter into a partnership is an action for damages; and there exist only two classes of cases in which the specific performance of such an agreement has been decreed.

I. Where the parties have agreed to execute some formal instrument which would confer rights which would not exist unless it was executed. *England* v. *Curling(b)* is a case of this kind.

II. Where there has been an agreement which has come to an end to carry on a joint adventure and the decree that the agreement is a valid agreement, prefaced by the declaration that the contract ought to be specifically performed is made merely as the foundation of a decree for an account. *Dale* v. *Hamilton(c)*, is an instance of this class of cases. From the earliest to the latest cases upon the subject it will be found, we believe, that a Court of Equity has never made a decree for the specific performance generally of a partnership. In decreeing specific performance the

(*a*) Lindley on Partnership II, 796, citing *Stocker* v. *Wedderburn*, 3 K. & J. 393: 26 L. J. Ch. 713. See too Fry on Specific Performance 18, 407, *Sichel* v. *Mosenthal*, 8 Jur. N. S. 275, 797 et seq.

(*b*) 8 Beav. 129. See *Buxton* v. *Lister*, 3 Atk. 385 and Mr. Swanston's note to *Crawshay* v. *Maule*, 1 Swanst. 513. "The principle upon which a court of equity proceeds in a case of this description, is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired" Lindley on Partnership II, 797, citing *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 726. See too per Sir T. Plumer M. R., *Nesbitt* v. *Meyer*, 1 Swanst. 226.

(*c*) 5 Ha. 369. S. C. on appeal, 2 Phil. 266.

1863. May 11. R. A. No. 21 of 1862.

Court has always to consider whether it can enforce the whole of the agreement, and where it cannot do so, this peculiar relief will always be refused. Here it would be quite impossible for the Court to compel the parties to carry out their own positive stipulations : a decree for a specific performance would therefore be a mere brutum fulmen.

As regards, however, the granting of the injunction the case is different. There is no doubt that Courts of Equity interfere by injunction between parties where the conduct of the defendant, either by misapplying the monies of the co-partnership or by excluding from the business a partner entitled to join in it, is practically violating the partnership-contract. This will sometimes be granted where the partnership is dissoluble at will, but always where it is, as the agreement in this case renders it, a partnership for a definite period. So upon the evidence in this suit, we think the plaintiff is equitably entitled to an injunction to restrain the first defendant from doing anything to exclude the plaintiff from participating in the contract and benefits of the partnership under the agreement. The decree ought, we think, to declare that the partnership is a subsisting partnership for the period specified in the agreement, and that the defendant is enjoined not to exclude the plaintiff from the exercise of his rights under the said partnership. The conduct of the defendant renders it necessary that he should pay the costs of this appeal.

The decree of the Court will be, to reverse so much of the decree of the Civil Judge as awards rupees 15,000 compensation, and so much of it as appears to decree a specific performance of the partnership contract. Declare that a partnership for four years subsists under the agreement dated 28th June 1861, also to restrain the defendant by injunction from excluding the plaintiff from the partnership-business and from doing any act to prevent it being carried on according to the articles.

Appellate Jurisdiction (a)

Special Appeal No. 114 *of* 1862.

MALAVARAYA NAYANAR...............*Appellant.*
OPPA'YI AMMA'L.........................*Respondent.*

An alienation of a portion of a zamíndárí by the zamíndár in favour of his sister cannot operate independently of her claim to maintenance so as to bind his successor, though the alienation may be binding as against the grantor during his life.
Special Appeal No. 15 *of* 1862 followed.

1863. May 11. S. A. No. 114 of 1862.

THIS was a special appeal from the decision of T. I. P. Harris, the Civil Judge of Trichinopoly, in Appeal Suit No. 238 of 1861.

Branson (*Ritchie* and *Sadagópácharlu* with him) for the appellant, the first defendant.

The facts appear from the following

JUDGMENT :—This was a suit for the establishment of the plaintiff right to a village named Husainabád, alleged to have been given to her for her subsistence by her brother, the deceased zamíndár, under an agreement marked A, and executed on the 18th Máchi of Viródhi (1851-52) and for recovery of arrears of rent due. The village was part of the zamíndárí.

The defendant denied the validity of the agreement, but the two lower courts upheld it and decreed for the plaintiff.

The question raised in this special appeal for our consideration is whether the agreement (A), as an alienation of this village, part of his zamíndárí, by the late zamíndár was invalid, and at all events inoperative beyond his own life.

The execution of A must be taken as unquestionable. But it appears that the plaintiff is a married woman, residing with her husband; and no right to subsistence, as against the first defendant, can, so far as the facts of this case disclose, be considered as existing on the part of the plaintiff, who is at present provided for and protected by her husband. We are therefore wholly relieved from any question arising out of the fact that the plaintiff is herself a female descend-

(a) Present Scotland, C. J. and Holloway, J.

1863. May 11. S. A. No. 114 of 1862.

ant of a former zamíndár possessing a present right to maintenance. The only question which we are called upon to decide is whether the agreement, as an alienation of this village by the former zamíndár, can operate independently of the claim to maintenance, so as to bind his successor. In *Special Appeal No.* 15 *of* 1862*(a)*, on a review of all the cases, it was decided that a zamíndár in possession cannot alienate his proprietary right so as to bind his legal successors. Following that decision, we think that the plaintiff is not entitled to succeed in the claim set up, and that so much of the decree of the court below as establishes the title of plaintiff to the village must be reversed. It appears, however, that a portion of the rent claimed fell due in the lifetime of the late grantor, and the agreement A being binding as against him, the plaintiff is clearly entitled to the rent claimed to the period of his death. Our judgment therefore is, that so much of the decree as establishes the title of the plaintiff to hold the village as against the first defendant, and also so much as awards rent subsequently to the death of the late zamíndár be reversed: but that the plaintiff is entitled to the rent due in the lifetime of the late zamíndár. The Civil Judge will ascertain the date of the death and modify the amount of rent decreed accordingly. The costs of the appeal will be paid by the plaintiff.

Appeal allowed.

(a) *Supra* p. 141.

Appellate Jurisdiction (*a*)

Regular Appeal No. 9 *of* 1862.

CHO'RAPATIJO'SI......................*Appellant.*
KRUPA'SINDHUPATI and another...*Respondents.*

Where the only question in a suit was referred for the decision of a pañcháyat under No. XXVII of the Agency Rules, and the pañcháyat determined the question and the Agent confirmed their decision :—*Held* that there was no further appeal.

Semble, per Holloway, J., that it might have been otherwise had the reference left other questions to be decided in the suit.

1863. *May* 26. *R. A. No.* 9 *of* 1862.

THIS was a regular appeal from the decision of G. S. Forbes, Agent to the Governor of Fort St. George at Ganjam, in Original Suit No. 1 of 1861.

The plaintiff claimed the exclusive exercise of an office designated in the plaint by the name of " Bhukta," and also sought the recovery of rupees 150, the amount of damages said to have been sustained by the act of the defendants in trespassing upon his rights in respect of that office.

The defendants denied the plaintiff's possession of any such exclusive privilege, and contended that they themselves were entitled to the office by inheritance from their grandfather Nádapati deceased. On examination of the parties it appeared that they both rested their respective claims on their alleged descent from this Nádapati, but repudiated all mutual relationship. The point—the only point at issue—was therefore referred by the Agent for the decision of a pañcháyat under No. XXVII of the Agency Rules. The pañcháyat determined the question in favour of the defendants, and the Agent accordingly dismissed the plaintiff's claim with costs.

Srínivásácháriya for the appellant, the plaintiff.

Sloan for the respondents, the defendants.

The argument turned on the construction of three of the " Revised Rules framed by Government for the guidance of the Governor's Agents, in Ganjam and Vizagapatam respectively, under Act XXIV of 1839." These three rules are as follows :—

(*a*) Present Frere and Holloway, J J.

1863. May 26. R. A. No. 9 of 1862.

"Rule XXI. From all decrees, upon original suits, passed by the Agent (with the single exception specified in the next following Rule) an appeal shall be to the Ṣadr Court to be disposed of as provided in section 4 Act XXIV of 1839; provided such appeal is preferred either to the Agent or the Ṣadr Court, within three months, after the Agent's decision; or after that period, if sufficient cause can be assigned to the Ṣadr Court which may have occurred, by petitioner on the prescribed stamp, and subject to the other Rules required in other appeals to the Ṣadr Court, as provided in the Madras Code and Acts applicable to that Presidency.

Rule XXII. From decree of the Agent in suits wherein the landed possession of a Zamíndár, Bessoye (b) or other Feudal Hill Chief, may have formed the subject of litigation, an appeal will lie to the Governor in Council alone, who may refer any such appeal for the decision of the Ṣadr Court, provided that decree of the latter Court shall not be carried into execution with the permission of the Governor in Council.

Rule XXVII, Clause 1. The Agent and his Assistants are authorized at their discretion to refer any suits or special questions in a suit, for examination and judgment by a pañcháyat, to consist of three or five persons, to be selected by the Agent or Assistant, after the plaintiff and defendant have had notice, and the witnesses have been assembled. The plaintiff and defendant, or their pleaders or múkhtárs shall each be permitted to challenge any members of a pañcháyat, and on giving sufficient reason for the challenge, another person or persons shall be selected, to apply his or their place. Pañcháyats assembled under these rules shall be guided by the enactments for District Pañcháyats, contained in the Madras Code of Regulations and Acts applicable to that Presidency; except as they are modified by these Rules. When a pañcháyat has been nominated, the Agent or his Assistant, shall immediately direct a gumáshta to attend the pañcháyat, whose duty it shall be, under the direction of the pañcháyat, to record their proceedings and award. The Agent or Assistant shall then direct them to proceed forthwith to some convenient place, in his kachhahrí, or ad-

(b) Probably a corruption of Tel. *vyavasáyakuḍu* 'cultivator' from Skr. *vyavasáya* 'cultivation.'

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joining it, to investigate the matter at issue. When the pleadings shall have been closed and evidence taken, the pañchâyat shall direct the gumâshta and parties to retire; and shall consult and decide on their award; and when they have come to a decision, they shall recall the gumâshta to record the award, which (award) having been duly attested with their signature, they shall deliver to the officer appointing the pañchâyat, by whom, if approved, a decree, in conformity therewith, shall be passed, which decree, in cases where the pañchâyat has been assembled by a subordinate, shall, previous to its execution, be submitted to the Agent, who shall either confirm, modify, or reverse the award, or remand the case for further investigation, or re-investigation by a pañchâyat, or otherwise as might to him seem expedient.

FRERE, J.:—The nature of the office of "Bhukta" which the plaintiff in this case sues to recover, has not been described either in the plaint or judgment in this suit(a). It is impossible therefore to decide in the present state of the case, whether the claim of the plaintiff is in its essence actionable, or whether it falls within the scope of the principle enunciated in the decrees of the late Ṣadr Court in cases Nos. 64 and 71 of 1844, published at pages 77 and 83 of the Select Decrees volume II, and briefly referred to at page 33 of Mr. Branson's *Vakíl's Digest*(b). Nor is it now necessary to decide this point, for it is clear that admitting the plaintiff's right of action, we have no option but to confirm the original judgment. The case turned altogether upon the question legally referred to the pañchâyat under the Agency Rules, and from their decision on the point of fact thus referred to them there is no appeal to this Court. I am of opinion therefore that our judgment must be for the defendants, now respondents, with all costs.

(a) Probably the Skr. *bhakta* 'colens, deditus, devotus, amans' Bopp Gloss. Sansc. 242, from *bhaj*. The Reporter is informed by Çrínivásáchárya, a Telugu Bráhman, that a *bhakta* is a person, generally, but not necessarily, a Bráhman, attached to a temple and serving the god and the priests. The priests feed, clothe and lodge the *bhakta*, but he receives no wages. The word has been borrowed by the Tamilians, in whose language *baktan* (பக்தன்) or *battan* (பத்தன்) means "a pious godly man, *(pattiyuḷḷón)*, a devotee or adherent of a religious system *(toṇḍan)*," Winslow, p. 726.

(b) "MI'RA'SI', a claim to exclusive right of shaving within certain limits cannot be upheld No. 64 of 1845; nor to exclusive practice of Midwifery. 71 of 1844."

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HOLLOWAY, J.:—In this case the only matter at issue was referred to a pañchâyat and was decided by it in favour of the defendant. The right of appeal is a statutory right, and unless it is given by the revised Agency Rules, it does not exist. In Rule XXI all regular suits decided by the Agent are declared subject to appeal with the exception of those specified in Rule XXII. If therefore the proceeding directed by Rule XXVII was a regular suit decided by the Agent, an appeal would undoubtedly lie. It seems clear to me that the true construction of these rules is that it is not such a suit; for, after providing for the disposal of such regular suits, the rules pass on to a wholly different subject-matter and then provide for a compulsory reference to arbitration. The decision of the arbitrators will be final, unless quashed by the officer assembling the pañchâyat. The rule then provides that in case of the assembly of the pañchâyat by a subordinate officer, the decree in conformity therewith shall not be executed until it has been submitted to the Agent. The whole language of the section seems to me to shew that the reference is clearly substitutionary for a regular suit, and that after the decision and confirmation there is no further appeal. It might be otherwise if the reference had embraced only one question in the suit and had left others to be determined in the course of a suit before the Agent; but here the whole question was referred, and I am clearly of opinion that there is no appeal. The result is that this application is dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 1 *of* 1862.

HARISCHANDANA DEVA..................*Appellant.*
RA'MANNA CHANDRI and others......*Respondents.*

Where a village, part of a zamíndárí, has been entered as a jágír on the accounts of the permanent settlement, the zamíndár cannot resume the village, and is entitled in respect thereof only to the usual kattubadi.

THIS was a regular appeal from the decision of G. S. Forbes, the Agent to the Governor of Fort St. George in Ganjam, in Original Suit No. 83 of 1856.

1863. *June* 4. *R. A. No.* 1 *of* 1862.

Sloan for the appellant, the plaintiff.

Branson for the respondents, the second and third defendants.

The facts appear from the following

JUDGMENT:—This was an action by the zamíndár of Tarla, a hill zamíndárí in the Ganjam District, for the recovery of the village of Rittapadu, situated within the limits of that estate.

The plaintiff urged that the full revenue or income of the village in question was included in the permanent assets of the estate, upon which the peshkash (land-revenue) was calculated; that the village is jiráítí or subject to the payment of the full revenue; that it had been dealt with as such both by former zamíndárs and by the Collector of the District; but that it had been granted by a former zamíndár to the father of the fourth defendant, who had sold it to the first. The plaintiff contended that as the successor of the original grantor, he was not bound to respect this grant, and that he was consequently entitled to resume the village, the produce of which is stated to be rupees 240 annually.

The defendants pleaded that the village in question was a mukhása ina'am; that it was so entered in the accounts of the permanent settlement; and that the plaintiff therefore was not at liberty to resume.

The Agent decided against the plaintiff's title to resume, and declared him entitled to a quit-rent only, on the ground

(a) Present Phillips and Frere, J J.

1863. June 4. R. A. No. 1 of 1862.

that the village had been entered as a jâgîr in the accounts of the permanent settlement.

The plaintiff appealed against this judgment.

We concur fully in the view which the Agent has taken of this case. The accounts of the permanent settlement clearly show that the peshkash payable by the zamîndâr was calculated not upon the entire revenue of the village in question, but upon the kaṭṭubaḍi or quit-rent only. We therefore affirm the Agent's decree and dismiss this appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 186 *of* 1862.

'ALI' HUSAIN and others..............*Appellants.*

NILLAKANDEN NAMBU'DIRI..............*Respondent.*

During the continuance of a first otti mortgage the janmí is in the same position as regards his right to make a second otti mortgage to a stranger after, as he was before, the lapse of twelve years from the date of the first mortgage.

Where a janmí made an otti mortgage and more than twelve years after made a second otti mortgage to a stranger without having given notice to the first mortgagees so as to admit of the exercise of their option to advance the further sum required by the janmí:—*Held* that the second mortgagee could not redeem the lands comprised in the first mortgage.

1863. June 8. S. A. No. 186 of 1862.

THIS was a special appeal from the decision of K. Kellu Nâyar, the Principal Ṣadr Amín of Calicut, in Appeal Suit No. 534 of 1861, affirming the decree of the District Munsif of Ernâd, in Original Suit No. 41 of 1859.

Mayne for the appellant, the second defendant.

Rámánuja Ayyangár for the respondent, the plaintiff.

The facts appear from the following

JUDGMENT:—This was a suit to redeem lands described in the plaint, and in the occupation of the first, second, third and fourth defendants, members of the same family, as otti mortgagees—the same lands having been recently assigned to the plaintiff by the janmí-proprietor, the fifth defendant, on a mortgage of the same description to a higher

(a) Present Scotland, C. J. and Frere, J.

amount. The plaintiff accordingly sued for possession of the lands, on payment of the former mortgage of 1843-4 held by the first, second, third and fourth defendants.

1863. June 8. S. A. No. 186 of 1862.

The second defendant denied the validity of the superior mortgage on which the plaintiff's claim was founded, and his legal right to redeem and dispossess him of the land.

The District Munsif passed judgment in the plaintiff's favour, on the ground that the term of twelve years during which a mortgage on otti tenure is entitled to continue in undisturbed possession, had elapsed before the date of the second mortgage to the plaintiff; and that after the lapse of the twelve years the janmí was at liberty to assign the lands on a superior otti mortgage to others, subject to the redemption of the land by payment of the debt to the first otti-holder. This decree was confirmed in appeal by the Principal Ṣadr Amín. It appears clearly that the twelve years under the first otti mortgage had expired before the second mortgage to the plaintiff and that the first mortgagees had not been given any notice of a further advance being required so as to admit of the exercise of their option to make such advance; and the question raised is whether the janmí proprietor was in a different situation as regards his right to make a second mortgage to a stranger after the lapse of the twelve years? We are of opinion that he was not. It has been frequently decided and is now well settled that an otti mortgagee must, if the janmí proprietor is desirous of obtaining a further advance by way of mortgage on the property, be allowed as a matter of right the option of making the advance himself, before the lands can be offered on superior mortgage and be made a valid security for an advance by a stranger; and no distinction has been made between the rights of the first mortgagee before and after the lapse of the twelve years. In this case, however, it is contended that the right to exercise this option is not co-existent with the redemption of the original mortgage, but is limited to the term of twelve years from the date of that mortgage, during which the right to redeem is suspended. No authority has been referred to which in any way countenances this limitation of the right, nor is there any evidence of a custom or usage to that effect; and in reason and principle we can see no ground for the distinction. During the twelve years the

1863. June 8. S. A. No. 186 of 1862.

otti-holder is a mortgagee, and so he continues until the land is redeemed, and the option in question is evidently in respect of his interest as mortgagee in almost the whole value of the land. The benefit to the mortgagee, too, does not really arise until after the twelve years, for during that period no advance can be obtained and applied so as to dispossess him of the land. Our opinion, then, clearly is that the right of the janmí proprietor as regards the option to which the otti-holder is entitled is the same after as before the expiration of the twelve years, and consequently that the decrees of the lower courts are not sustainable in law. In reversing the decree of the Principal Ṣadr Amín we direct that the plaintiff do bear all costs.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 417 *of* 1862.

NARASU REḌḌI..........................*Appellant.*
KRISHṆA PADAYA'CHI..................*Respondent.*

Where the statute of limitations was not pleaded in the Original Court:—*Held* that it might be set up in the Appeal Court if evidence could be taken there in reply to such plea.

On special appeal the statute of limitations cannot for the first time be pleaded unless where the facts which raise the plea are admitted.

1863. June 8. S. A. No. 417 of 1862.

THIS was a special appeal from the decree of George Ellis, the Civil Judge of Cuddalore, in Appeal Suit No. 4 of 1861, reversing the decree of the District Munsif of Vilupuram in Original Suit No. 293 of 1860. The plaintiff sued for rupees 504-8-0, the amount due to him on a mortgage-bond, dated the 21st of March 1840, and made by the first defendant's father. The Munsif decreed for the plaintiff. The first defendant appealed to the Civil Court, urging for the first time that the plaintiff's claim was barred by the law of limitation. The Civil Judge, considering that the statute applied, reversed the Munsif's decree with costs. The plaintiff now specially appealed.

Branson for the plaintiff, the appellant, contended that the statute of limitations could not be set up for the first time on appeal.

(a) Present Scotland, C. J. and Frere, J.

Kárunágara Manavan for the respondent, the first defendant. 1863. *June* 8. *S. A. No.* 417 *of* 1862.

Scotland, C. J. :—I am of opinion that the statute of limitations may be set up for the first time on appeal wherever the plaintiff has an opportunity of meeting the plea by evidence; and in a case reported in the fourth volume of Moore's Indian Appeal Cases(*a*) an objection raised for the first time at the hearing of the appeal before the Privy Council—that the Government's right to sue was barred by a Regulation of limitation—was expressly sustained. Here the plaintiff, on the appeal to the Civil Judge, must have had ample opportunity of bringing forward evidence to meet the defence in question, but he does not appear to have done so, and the Civil Judge, considering upon the evidence that the statute applied, very properly dismissed his appeal.

I may remark that, in this Court, on *special appeal*, the plea of the statute of limitations cannot for the first time be set up, unless, indeed, the facts which raise the plea and appear in the case are admitted by the plaintiff.

Frere, J. concurred.

Appeal dismissed.

(*a*) *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government*, 4 Moo. I. A. C. 466, 508, and see *Mt. Imam Bandi* v. *Hurgovind Ghoose*, Ibid. p. 414.

Note.—See M. S. D. 1851, p. 252 : M. S. D. 1860, p. 31.

Appellate Jurisdiction (*a*)

Special Appeal No. 387 *of* 1862.

Kaipreta Ramen........................*Appellant.*

Makkaiyil Mutoren and others....*Respondents.*

The assent of the anandravans is necessary to a sale of tarawád land by a káranavan.

The chief anandravan's signature to the instrument of sale is sufficient, but not indispensable, evidence of such assent.

THIS was a special appeal against the decree of G. R. Sharpe, Officiating Sub-Judge of Calicut, in Appeal Suit No. 282 of 1861, affirming the decree of J. M. D'Rozario, District Munsif of Calicut, in Original Suit No. 575 of 1858. That suit was brought to recover lands sold to the first defendant in 1846-47 by one Rairu Náyar, the káraṇavan of the plaintiff and of the second and sixth defendants. 1863. *June* 13. *S. A. No.* 387 *of* 1862.

(*a*) Present Phillips and Holloway, J J.

1863. June 13. S. A. No. 387 of 1862.

The evidence proved the purchase from Rairu Náyar, and also that the plaintiff was present at such purchase and offered no objection thereto. But though it did not appear that the instrument of sale was signed by any of the vendor's anandravans, the District Munsif dismissed the suit, and on appeal the Officiating Sub-Judge affirmed his decree.

Mayne for the appellant, the plaintiff, contended that the sale of tarawáḍ property was invalid without the signatures of the chief anandravans as well as that of the káraṇavan, and that the fact that the plaintiff was present without making objection did not supply the defect. He cited Strange's *Manual of Hindú Law* 1st ed. § 378. "The káraṇavan can alienate all moveable property, ancestral or self-acquired, at his discretion. But as to immoveable property, whether self-acquired or ancestral, he must have the *written* assent of the chief anandravans."

PER CURIAM :—The sale by a káraṇavan of tarawáḍ land requires, no doubt, the consent of the anandravans. But the signature of the chief anandravan, if sui juris, is sufficient evidence of the assent of himself and the rest to the sale, and throws the burden of proving dissent therefrom on him who alleges such dissent. The anandravans' assent, however, may be proved by means other than the signature of the senior; and in the present case, where the Court has found that the plaintiff, an anandravan, was present and assented to the sale, he clearly has no ground for this appeal.

Appeal dismissed.

Original Jurisdiction (a)

THE SECRETARY OF STATE *against* MI'R MUḤAMMAD HUSAIN and others.

An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter.

Hoggart v. *Cutts* (Cr. & P. 197) observed upon.

1863. June 16.

THIS was an interpleader suit arising out of claims made by the several defendants on the whole or part of a sum of rupees 4,123-6-9 payable to the parties entitled thereto under a series of transactions which began with an

(a) Present Scotland, C. J. and Bittleston, J.

agreement dated the 4th July 1859 and entered into by Captain Rawlins, the Garrison Engineer of Fort St. George, Madras, on behalf of the plaintiff, for the supply of building materials for the Department of Public Works. Muttusvámi, the third defendant, only claimed rupees 1,517-0-8 part of the sum of rupees 4,123-6-9. The other defendants, (except one who disclaimed) severally or jointly claimed the whole of the latter sum. The Court decreed in favour of the first and second defendants, and the only question was as to whether the plaintiff was entitled to his costs.

Stokes, for the seventh, eighth and ninth defendants.

The plaintiff to an interpleader suit has no right to his costs if the suit be improperly instituted: *Crawford* v. *Fisher*(a), *Cook* v. *Earl of Rosslyn*(b). To warrant an interpleader suit each of the defendants must claim the whole fund: *Hoggart* v. *Cutts*(c): Seton on Decrees 3rd ed. 965, which is not the case here, where Muttusvámi only claims rupees 1,517-0-8.

SCOTLAND, C. J.:—As a general rule it is clear that the plaintiff in a properly instituted interpleader suit is entitled to his costs. In such case, indeed, it has been ruled that he is entitled to a lien for his costs on the fund, and is not forced to take his chance of getting them from the defendant against whom the Court decides(d). Then are the circumstances here such as to warrant us in saying that the plaintiff acted unreasonably or improperly in filing the present bill? Clearly not. [His Lordship here stated the circumstances which led to the suit and proceeded thus:] But Mr. Stokes objects that in order to warrant an interpleader suit each of the defendants must claim the whole of the subject-matter of the suit. That very argument appears to have been used, and used unsuccessfully, in *Hamilton* v. *Marks*(e), and it would require very conclusive authorities to induce me to assent to a doctrine so inconvenient and unreasonable. The only case cited on the point was *Hoggart* v. *Cutts*(f),

(a) 1 Hare 436.
(b) 7 Jur. N. S. 1070 and see a case from Cha. Rep. 257 cited in 2 Cox 279.
(c) Cr. & P. 197, 204.
(d) *Campbell* v. *Salomons*, 1 Sim. & S. 462 per Sir John Leach V. C.
(e) 5 DeG. & S. 638, 642, 643.
(f) Cr. & P. 197.

1863. June 16. the marginal note to which seems, no doubt, to support Mr. Stokes' contention. But that note(*a*) does not appear warranted by the facts of the case. There Thodey, a defendant, sold an estate, which the first defendant Cutts purchased, paying a deposit. Then Hoggart, the plaintiff, an auctioneer, by Thodey's direction, put up the estate again, and Vickers, another defendant, bought it and paid a deposit. The question was who was entitled to the deposits? Clearly this and other questions could not be decided in that suit of *Hoggart* v. *Cutts* as between Cutts and Vickers on the one hand and Vickers and Thodey on the other. "The bill," said Lord Cottenham, "is a proper bill as between *Hoggart, Cutts* and *Thodey:* there can in that suit be no question about *Hoggart's* conduct. He is a mere auctioneer employed to sell the estate, and has a right to make *Cutts* and *Thodey* determine between themselves which of them is entitled to a fund in which he claims no personal interest. The suit, however, cannot be sustained as to *Vickers* also; and if I am to decide which of the defendants *Cutts* or *Vickers*, is to be dismissed from the suit, I have no hesitation in retaining *Cutts*, because he is the first purchaser, and because the case as to him is the more simple." The bill was therefore dismissed as to Vickers. That was the decision in *Hoggart* v. *Cutts*, and I think that it neither justifies the marginal note nor supports Mr. Stokes' argument.

BITTLESTON, J., concurred.

DECREE.

Tax costs of plaintiff and, deducting therefrom rupees 82-4-0, pay the balance of such costs as between party and party out of the fund in court, and pay the residue to the first and second defendants or their solicitors.

(*a*) "Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions, and the stakeholder filed a bill of interpleader against the three claimants, the Court, at the hearing, dismissed the bill with costs as against one of the parties claiming a part of the fund, and decreed that the other two parties should interplead as to the other part."

Appellate Jurisdiction (a)

Special Appeal No. 38 *of* 1863.

BAWA'NI SAṄKARA PAṆḌIT..............*Appellant.*
AMBABA'Y AMMA'Ḷ.........................*Respondent.*

The adopted son of one whose alleged adoption has been held invalid can make no claim through his adoptive father to be maintained by the alleged adopter.

The natural rights of a person adopted remain unaffected when the adoption is invalid.

Quaere whether a right to maintenance can descend as an estate.

1863. *June* 18. *S. A. No.* 38 *of* 1863.

THIS was a special appeal from the decision of E. W. Bird, the Acting Civil Judge of Negapatam, in Appeal Suit No. 467 of 1861, affirming the decree of V. Sundara Náyudu, Principal Ṣadr Amín of Negapatam, in Original Suit No. 16 of 1861. The plaintiff sued the defendant for Rs. 9,700 alleged to be due for the maintenance of the former and the widow of his adoptive father, Kistnaji Kónéri Paṇḍit. Kistnaji had been adopted by the defendant, a widow, but such adoption had been found invalid as the adopter had not been authorised to adopt by her deceased husband. Accordingly the Ṣadr Amín and, on appeal, the Civil Judge declared the plaintiff's suit unsustainable.

Saḍagópáchárlu for the special appellant, the plaintiff. The appellant's adoptive father was entitled to maintenance: he had a right to adopt: my client's adoption was valid; and therefore he succeeds to his adoptive father's right to maintenance. It would have been the same had the plaintiff's adoptive father been a natural son.

[HOLLOWAY, J.:—Then the maintenance would have been given merely out of compassion. It seems absurd to contend that maintenance given from such a motive should be extended to the son of one illegally adopted. Can a right to maintenance descend as an inheritable estate?] An adoption, though invalid, severs the person adopted from his natural family: T. L. Strange's *Manual of Hindú Law*, 2nd ed. § 119(*b*) That is the ground for holding him entitled

(*a*) Present Scotland, C. J. and Holloway, J.

(*b*) "The severance of the boy from his natural family by gift made of him for adoption is so absolute that he cannot be re-attached to his natural family, or be re-admitted to his rights of property therein, *even should his adoption into the adopting family* [leg. the family of the adopter—*Rep.*] not stand good in law. Being devoid of inheritance in either family he remains a charge upon his adopter for maintenance."

1863. June 18. S. A. No. 88 of 1863.

to maintenance. *Ibid.* and sec. 197 : See Sir T. Strange's *Hindú Law,* I, 82 *(a)*: *Dattaka Chandriká* s. 1, cl. 14*(b)*. Here there must have been an acceptance of the plaintiff's father [SCOTLAND, C. J. :—Acceptance by a woman without authority is no acceptance at all. Do you contend that an invalidly adopted son loses the right to inherit from his natural father and has merely a right to be maintained by his alleged adoptive father ?

Saḍagópáchárlu. Yes, if there has been an adoption in fact. Strange's *Manual,* § 197*(c)*, *Dattaka Chandriká* sec. 1, cl. 15*(d)* and sec. 6, cl. 4*(e)*.

(*a*) " An adoption of one of a different class from the adopter has, in general, nothing but disqualifying effects. Parted with by his parents, it divests the child of his natural, without entitling him to the substituted claims, incident to an unexceptionable one. Incompetent to perform effectually those rites, on account of which adoption is resorted to, he cannot inherit to the adopter, but remains a charge upon him, entitled only to maintenance"—citing Datt. Chand. sec. i, 14, et seq.—Id. sec. vi, 4. Mit. on Inh. ch. 1, xi, 9 and note, and adding " Qu. tam. Mr. Sutherland, translator of the Treatises on Adoption, being of opinion that the adoption being void, the natural rights remain." The passage from the Mitáksharâ (i, xi, 9) is as follows : " He who is given by his mother with her husband's consent, while her husband is absent, [or incapable though present] or [without his assent] after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (*dattaka*) . So Manu declares " He is called a son given (*dattrima*) whom his father or mother affectionately gives as a son, being alike [by class,] and in a time of distress ; confirming the gift with water."

(*b*) " Alike not by tribe, but by qualities, suitable to the family. Accordingly a Kshatriya, or a person of any other inferior class may be the given son of a Brahmaṇa." As for this interpretation by Medhátithi it is thus reconciled. Where, there may be no real legitimate son, although as being inferior in class the Kshatriya and the rest are not entitled to present the oblation of food, and water ; still, their filial relation may be legally established, by reason of their being beneficial in perpetuating the name, and the like ; but, as they are beneficial in a small degree, they only receive maintenance."

(*c*) [A man is bound to maintain his father......] " Also one adopted by him but who may prove disqualified for adoption."

(*d*) " Kátyáyana declares this " If they be of a different class, they are entitled to food and raiment only." Çaunaka also " If one of a different class should, however, in any case, have been adopted as a son, he should not make him participator of a share : this is the doctrine of Çaunaka. By Yájñavalkya also it is declared that one of the same class presents the funeral cake, and participates in a share ; but the filial relation of one of a different class is not denied ; and Yáska, explicitly declares this : ' A person of the same class must be adopted as a son. Such a son performs the oblations and takes the estate ; on default of him one different in class who is regarded merely as prolonging the line. He receives food and raiment only, from the person succeeding to the estate.

(*e*) " It is declared, by an author in the following text, that a son given likewise who is of a different class, does not inherit. If one of a different class, should however in any instance have been adopted as a son, he should not make him participator of a share. This is the doctrine of Çaunaka."

1863. June 18. S. A. No. 38 of 1863.

HOLLOWAY, J. :—How can there be an adoption in fact when that has not taken place which is necessary to constitute an adoption ?

Saḍagópácházrlu : Suppose the case of an adoption of a son whose tribe is not that of the adoptive father.

HOLLOWAY, J. :—If a man marry another man's wife, not knowing her to be so, is that a marriage in fact ?

SCOTLAND, C. J. :—In old times when the performance of religious rites for the purpose of adoption was considered of more importance, perhaps, than it is now, maintenance may have been given to an invalidly adopted son in consequence of the effect which was attributed to those rites. In a religious point of view he may possibly have lost rights in his natural family. But it is hard to see how a man forfeits his natural temporal rights by being adopted into another family when such adoption is invalid. You must in effect say here that though the intended adoption has never gone beyond a mere expression on the part of the natural father such as 'I will give you my son,' that destroys the son's right to inherit from him.

Saḍagópáchárlu. If the adopted son perform the funeral rites of his adoptive father, this would disentitle him to perform those of his natural father, and to inherit his estate.

SCOTLAND, C. J. :—I doubt that. Suppose a man has two sons and gives the younger son in adoption, and the adoption turns out invalid, and the elder son dies, why could not the second son bring a suit to establish his right ?

Saḍagópáchárlu. I am not prepared to say.

HOLLOWAY, J. :—'He knoweth not the law that knoweth not the reason of the law.'

V. Raṅgácházrlu, for the respondent, the defendant.

The Court delivered the following

JUDGMENT :—The plaintiff in this suit as the adopted son of Kistnaji Kónéri Paṇḍit, who it is alleged was the adopted son of the defendant, a widow seeks to recover a sum for the maintenance of himself and his adoptive mother. The defendant denies the right of the plaintiff to recover.

1863. June 18. S. A. No. 88 of 1863.

No doubt exists as to the validity of the plaintiff's adoption by Kistnaji Kónéri Paṇḍit. But at the original hearing it was proved by the record of the proceedings in Original Suit No. 18 before the Subordinate Judge (the same being a suit by Kistnaji Kónéri Paṇḍit as adopted son to recover from the defendant the property left by her husband, to which the present plaintiff was a party), that the alleged adoption by the defendant of Kistnaji Kónéri Paṇḍit was, by the decree in the suit pronounced to be of no validity, on the ground that though the forms and ceremonies of an adoption appeared to have taken place after the death of the defendant's husband, the defendant had no authority whatever from her husband to adopt. The record in Appeal Suit No. 41 of 1849 before the Civil Judge in which the original decree was affirmed was also in evidence.

Upon this evidence both the lower courts have decreed against the plaintiff deciding that, as the adopted son of one whose alleged adoption had been held to be invalid in law, he could make no claim to maintenance from the defendant through his adoptive father. And we are of opinion that a right decision has been arrived at.

In reason and good sense it would seem hardly a matter for doubt that where no valid adoption, in other words, no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law. But in this case it was contended on the part of the plaintiff (the appellant) that although Kistnaji Kónéri Paṇḍit was precluded from all right to inherit in the family of the defendant's husband, yet that by reason of the forms and ceremonies attending an adoption having been gone through, the law gave him the right to claim maintenance from the defendant, and that such right passed to the plaintiff as his son by a valid adoption, just as it would have passed to his natural son. In support of this, reference was made to Mr. Strange's *Manual*, sections 120 and 197, Sir Thomas Strange's *Hindú Law*, I, p. 82, and to the *Dattaka Chandriká* by Sutherland, section 1, clauses 14, 15, and section 6, clause 4.

Now the passages in the two former works rest upon the authority of the *Dattaka Chandriká* and the *Mitáksha-*

rá on inheritance, chap. I, sec. XI, clause 9 ;(*a*) and having considered what is to be found in these authorities, we are of opinion that no legal ground is afforded for the present claim to maintenance. Mr. Strange in section 119 of the second edition of his *Manual* no doubt states broadly that a boy, after a gift made for adoption, cannot be re-admitted to his family rights should his adoption "not stand good in law," and that devoid of inheritance, he has a claim to maintenance. And an observation to the same general effect occurs in a late judgment delivered by Mr. Strange, then a Judge of this Court, in the case of *Ayyávu Muppanár* v. *Níládaṭchi Ammáḷ*(*b*). But Sir Thomas Strange's observations are confined to the adoption of one of a different class from the adopter, and he puts the claim to maintenance on the ground that such an adoption, while it divests the child of his natural claims, does not entitle him to all the incidents of an unexceptionable adoption and enable him effectually to perform those rites which are essential to the right to inherit; and this in effect is supported by the *Dattaka Chandriká*, section 1, clauses 14, 15. Where however both the author and the commentators to whom he refers, make the claim of adopted sons of a different class, more expressly and distinctly to rest upon the ground, that although not qualified to present the oblations and perform the rites essential to inheritance, they acquire a filial relationship, (as is there said) "by reason of their being beneficial in perpetuating the name and the like: but as they are beneficial in a small degree, they only receive maintenance." See also the *Dattaka Mímámsá*, section 3.

The doctrine so laid down treats the adoption as one that may be made and existing, and of validity for one of the purposes of adoption according to Manu, quoted in Clause 3 of the same section; though not for the other purpose of "the funeral cake, water and solemn rites." How

(*a*) "He who is given by his mother with her husband's consent, while her husband is absent [or incapable though present] or without his assent after her husband's decease, or who is given by his father or by both, being of the same class with the person to whom he is given, becomes is given son (*dattaka*). So Manu declares 'He is called a son given (*dattrima*) whom his father or mother affectionately gives as a son being alike by class and in a time of distress; confirming the gift with water."

(*b*) Supra, p. 45.

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far this doctrine now holds good as law we are not called upon to consider, as it has, we think, no application to the present case. But we may observe that there appears to be nothing in the Mitáksharā to the same effect, and Sir Thomas Strange's in a note to the passage before referred to, questions the claim to maintenance and says, "Mr. Sutherland, translator of the Treatise on adoption, being of opinion that the adoption being void, the natural rights remain, and applied to the present case, this opinion of a very high authority upon the subject is entitled to the more weight, that it is clearly logical. If there was no adoption nothing can have been acquired and nothing lost.

In the present case the question does not turn upon any personal disqualification on the part of Kistnaji Kónéri Paṇḍit, and we think the natural rights of the plaintiff remain in law quite unaffected. In this case the authority of the defendant's husband was indispensable to the validity of the adoption relied upon by the plaintiff: without it the absolute essentials of adoption for civil purposes, the giving and receiving, could not with any legal effect take place; and it would be strangely inconsistent and unreasonable, if the mere formal performance of certain customary rites and ceremonies connected with adoption, which as regards the *civil* rights of the person adopted, would probably not be treated as necessary to its legal efficacy, (1 Sir Thomas Strange's *Hindú Law*, 96; *Veeraperumal Pillay* v. *Narrain Pillay*(a), were held to confer the right to enforce maintenance by a civil suit. We think there is nothing in Hindú law which requires or would warrant such a decision, and that as in this case there was no valid adoption by the defendant the suit must fail.

This decision renders it unnecessary to give any opinion upon the other question argued at the bar, whether, if the right to maintenance had existed in Kistnaji Kónéri Paṇḍit, that right would as an estate have descended to his sons natural or adopted.

Our judgment therefore is in affirmance of the decree of the Civil Court. The costs of this appeal will be borne by the appellant.

Appeal dismissed with costs.

(a) 1 Strange's Notes of Cases, 100.

Appellate Jurisdiction (a)

Special Appeal No. 188 *of* 1862.

KISARA RUKKUMMA RAU and another........*Appellants.*
ÇRI'PATI VIYANNA DIKSHATULU...............*Respondent.*

The rule under Reg. XIV of 1816, sec. 30, that each of two vakíls appointed by a party to a suit shall be entitled to a moiety of the fee payable, applies only to cases where they are appointed by the same vakálatnáma.

In the absence of a demand in writing, interest up to the date of suit cannot be awarded upon sums, not payable under a written instrument, of which the payment has been illegally delayed.

THIS was a special appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Appeal Suit No. 138 of 1860, affirming the judgment of the Principal Ṣadr Amín of Masulipatam in Original Suit No. 6 of 1860. 1863. *June* 22. *S. A. No.* 188 *of* 1863.

The plaintiff sued for rupees 595-2-11, being fees, with interest, payable to him by the defendant for work done by the plaintiff as the vakíl of the defendant in certain suits which were compromised at the close of the pleadings.

The Principal Ṣadr Amín and, on appeal, the Civil Judge awarded three-fourths of the fees which would have been payable if the suits had respectively terminated by a decree. And, though there was no allegation of a demand in writing, the Ṣadr Amín and Civil Judge awarded interest up to the date of suit.

Mayne for the special appellant, the first defendant.

First. Under Regulation XIV of 1816 section 30 the plaintiff, being only one of two vakíls appointed by the defendant was entitled to only one-half of the fee. That section enacts, first, that "the parties in a suit are respectively permitted to entertain two or more pleaders, who shall either divide the authorized fee between them, in an equal, or in any other proportion which may have been previously agreed upon between them and their constituent, or shall each be entitled to receive the full established fee, *as may be specified in the vakálatnáma; but all stipulations to this effect shall be distinctly stated in the vakálatnáma, which shall otherwise be construed to entitle the whole of the vakíls ap-*

(a) Present Scotland, C. J. and Holloway, J.

1863. June 22. S. A. No. 188 of 1863.

pointed by it to an equal division of the established fee and no more(a). Second. It shall be sufficient in such cases for the party employing two or more vakíls in the same suit, to file a single vakálatnáma; *but the party shall be required to deposit in court the whole amount of the fees payable to his pleaders, under the rules contained in Section XXIII, of this Regulation(b).* "Third. If the party shall agree to pay to each of the vakíls employed by him the full amount of the authorized fee, the opposite party in the suit shall in no case be required to make good more than the fee of one of those pleaders, or such part of that fee as may be adjudged against him by the court. The fees of the other pleader are to be considered as a separate expense, to be defrayed exclusively by the party entertaining him, and for which he is not to be reimbursed in any case whatever."

Secondly. One-half, and not three-fourths, of the fee should have been awarded. Section 31 of Regulation XIV of 1816 enacts, first, that "if a suit shall be withdrawn or dismissed on default without a determination upon the merits of the case before all the requisite pleadings shall have been filed in court, the respective pleaders of the plaintiff and defendant, or of the appellant and respondent, shall each be entitled to only one-fourth of the established fee, which they would have received had the suit been brought to a regular decision by the court. If a suit shall be withdrawn or dismissed on default after all the requisite pleadings shall have been filed in court, the respective pleaders are to be entitled to one-half the fees which they would have received if judgment had been given in the cause. The fees in both of the above-mentioned cases are to be charged to the plaintiff or appellant withdrawing the suit, or suffering it to be dismissed on default, together with all the admitted costs incurred

(a) The passages in italics have been virtually repealed by Act I of 1846.

(b) This Act, which extends to India the provisions of 3 and 4 W. 4, c. 42, s. 28, enacts that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

1868. June 22. S. A. No. 188 of 1868.

by the defendant or respondent. "Second. The same rules shall be considered applicable to cases adjusted by rázíná-ma, except that the fees of the pleaders and all other costs of the suit, shall be paid by the parties in such manner and proportions as may have been agreed upon, and inserted in the rázínáma."

Thirdly. As there was no allegation of a demand in writing, interest should not have been awarded up to the date of suit. Act XXXII of 1839.

The Court delivered the following

JUDGMENT:—The first point made for the appellant was that under section XXX Regulation XIV of 1816, the present plaintiff, being only one of two vakíls appointed by the defendant, is entitled only to one-half of the fee payable. We are of opinion, however, that this rule applies only to cases in which two or more pleaders are appointed by the same vakálatnáma. If it were otherwise it is manifest that the practitioner's remuneration might without his knowledge be reduced to a sum for which he would wholly have declined to undertake the duty.

On the second point that one-half and not three-fourths of the fee should have been awarded, we are of opinion that the decree is wrong and must be modified. Section XXXI of Regulation XIV of 1816 is the enactment upon which the question depends, and it is there distinctly provided that one-half of the established fee only is to be paid if the case is determined by agreement at the close of the pleadings. After they have been filed we are unable to find any provision for the award of three-fourths of the fees, and can only suppose that the result has been attained by adding one-fourth of the fee payable if the suit goes off before the close of the pleadings to the one-half payable if it is determined at their close. The decree must be modified by the allowance of one-half instead of three-fourths.

The question of interest depends upon the true construction of Act XXXII of 1839(c), and judgment on this point was not given at the hearing to enable us to consider the effect of the words "Provided that interest shall be payable in all cases in which it is now payable by law." If

1863. June 22. S. A. No. 188 of 1863.

the practice which has unquestionably prevailed in the Mofussil courts for a long series of years of awarding interest upon all demands of which the payment has been illegally delayed, was shown to be based upon any existing regulation or positive rule of law by which interest would at the time the Act passed have been payable in respect of this debt, unquestionably it would still be payable notwithstanding the enactment. We are unable, however, to find any such provision, and it necessarily follows that, there being no allegation of a demand in writing, the award of interest up to the date of suit must be disallowed. The appellant is entitled to the costs of this appeal.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 369 *of* 1862.

ILATA SHAVATRI and another............*Appellants.*
ILATA NA'RAYANAN NAMBU'DIRI.........*Respondent.*

A Hindú adulteress living apart from her husband cannot recover maintenance from him so long as the adultery is uncondoned.

A daughter living apart from her father for no sufficient cause cannot sue him for maintenance.

1863. June 25. S. A. No. 369 of 1863.

THIS was a special appeal from the decree of Wm. Holloway, Civil Judge of Tellicherry, in Appeal Suit, No. 442 of 1861, reversing the decree of J. M. D'Rozario, the District Munsif of Calicut, in Original Suit No. 450 of 1858. This suit was brought by the wife and daughter of the first defendant to recover certain ancestral property in his possession, out of which they alleged themselves to be entitled to maintenance. It appeared that the first plaintiff had committed adultery, that she had consequently been expelled from her caste, and that she and her daughter had left the first defendant's house and were then living apart from him. The Munsif, however, fancying that Act XXI of

(a) Present Phillips and Frere, J J.

1850(*a*) applied, decreed for the plaintiffs with costs. On appeal the Civil Judge reversed the Munsif's decree in the following judgment: 1863. *June* 25. *S. A. No.* 369 *of* 1863.

"This is a suit by a woman whose own witnesses admit her to have committed adultery, to recover subsistence from her husband. Nothing is more manifest than the principle that adultery uncondoned bars a suit for maintenance. If the people of the plaintiff's caste had chosen from a capricious exercise of their authority, to expel her from her caste, her right would by no means have been barred. Act XXI of 1850 simply prevented the fact of a man differing from his forefathers upon matters of the greatest difficulty and of the highest concern, from stripping him of his property. It cannot interfere with the plain rule both of all ecclesiastical law and of all morality, equally existent in the English and Hindú law, which I have here set forth. The daughter can have no possible right of action against her father, and at any rate her case must fail from suing in the present combination. If she has any rights, they must be founded on a totally different basis. As far as here appears she absents herself from her father's house, and with a feeling perhaps not unnatural, clings to her guilty mother, but nothing is alleged or proved in this suit to show her entitled to that to which no daughter is *prima facie* entitled to, namely, a separate subsistence."

Mayne, for the plaintiffs the special appellants, contended, first, that adultery was not a bar to an action for maintenance; secondly, that a daughter might sue for maintenance, and thirdly, that there was no misjoinder.

Karunágara Manavan, for the respondent, was not called upon.

PHILLIPS, J.:—This appeal must be dismissed. On the first point it is clear, both from textbooks and cases, that a Hindú wife leaving her husband's house without sufficient

(*a*) This Act enacts that "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the courts established by Royal Charter within the said territories.

1863. June 25. S. A. No. 869 of 1863.

cause cannot claim maintenance. *A fortiori* this is so, when, as in the present case, the wife is admittedly an adulteress. So by English law, a wife's departure from her husband without sufficient reason exempts him from the duty of supporting her, and her elopement accompanied with adultery discharges him from all obligations to find her necessaries, and he will not be bound by her contracts for them, unless of course he pardons her and takes her back*(a)*. But here neither misconduct nor condonation on the part of the husband is even suggested. Then as to the daughter, I concur with the learned Civil Judge in holding that no daughter is *prima facie* entitled to a separate subsistence, and that nothing is alleged or proved to shew the second plaintiff entitled thereto. It thus becomes unnecessary to consider the point taken as to misjoinder.

FRERE, J. concurred.

Appeal dismissed.

(a) Bright *on the Law of Husband and Wife*, II, 14.

NOTE.—See *Vyavahára Mayúkha*, ch. IV, sec. XI § 12. " If she be unchaste a woman must be turned out of doors and without a maintenance :" *R. A. No.* 2 *of* 1823, Mad. Sel. Dec. 366 : T. L. Strange, *Manual of Hindú Law*, 2d ed. § 198, M. S. D., 1857, p. 139.

" Infidelity in the female, save in certain of the lowest classes, occasions forfeiture of caste and puts an end to the marriage." T. L. Strange, *Manual of Hindú Law*, 2d ed. p. 11, citing the *Smŕti Chandriká*.

As to impropriety of conduct disentitling a Hindú *widow* to maintenance see *Ranee Bussunt Koomaree* v. *Ranee Kummul Komaree*, 7 S. D. A. Rep. 144 : 1 Morl. Dig. 441.

Appellate Jurisdiction (a)

Special Appeal No. 145 *of* 1863.

NAMASIVA'YA CHETṬI..............*Appellant.*

SIVAGA'MI and others................*Respondents.*

The widow of an undivided Hindú has no right to sell his property for payment of his debts, even though it be self-acquired.

1863. June 27. S. A. No. 145 of 1862.

THIS was a special appeal from the decision of V. Sundara Náyuḍu, the Principal Ṣadr Amín of Negapatam, in Appeal Suit No. 479 of 1861, affirming the decree of S. Vaiyadanáyagam, the District Munsif of Máyavaram, in Original Suit No. 238 of 1859.

(a) Present Phillips and Frere, J J.

Kárunágara Manavan for the appellant, the plaintiff. 1863. *June* 27. *S. A. No.* 145 *of* 1862.

Mayne for the respondents, the defendants.

The facts appear from the following

JUDGMENT :—This was a suit by the plaintiff, as undivided brother of the second defendant, and of the deceased husband of the first defendant, to recover a two-thirds share of a house, said to have been illegally sold by the first defendant to the third.

The lower courts upheld the sale in question, and dismissed the plaintiff's claim, on the ground that the house was the self-acquired property of the first defendant's husband, and that the sale was made by the widow, the first defendant, for the purpose of paying her husband's debts.

We consider it clear that the grounds on which the lower courts have decided this case are untenable in point of law. The brothers being undivided, it is manifest that on the death of one of their number the widow had no right to deal with his property, whether self-acquired or not; and the sale is consequently invalid. We therefore reverse the decision of the Principal Ṣadr Amín, and pass judgment in favour of the plaintiff for the property claimed in the plaint. The costs incurred by the plaintiff throughout the entire case will be charged to the first and third defendants jointly and severally.

Appeal allowed.

Original Jurisdiction (a)

Original Suit No. 85 *of* 1863.

VI'RASVA'MI CHEṬṬI *against* APPA'SVA'MI CHEṬṬI.

A Hindú wife is not entitled to maintenance if she leaves her husband without a justifying cause.

The husband's marrying a second wife is not such justifying cause.

Where, therefore, a Hindú husband married a second wife, and his first wife thereupon left him :—*Held* that the first wife had no implied authority to borrow money for her support.

Semble the prohibition against a plurality of wives save under certain circumstances, is merely directory and not imperative.

THIS was a suit to recover rupees 924-13-5, being rupees 700 lent to the defendant's wife on the 3rd September 1860, and rupees 224-13-5, being interest thereon at 12 per cent. per annum from 3rd September 1860 to the 7th of May 1863. 1863. *June* 30. *O. S. No.* 85 *of* 1863.

(a) Present Scotland, C. J. and Bittleston, J.

1863. June 30. O. S. No. 85 of 1863.

The plaintiff affirmed and the defendant denied that he the plaintiff on or about the 3rd of September 1860 lent to the defendant's wife Vijjaya Ammál the sum of rupees 700. The first issue therefore was whether that sum was so lent as in the plaint alleged.

The plaintiff also affirmed and the defendant denied that the said sum was necessarily borrowed by the said N. Vijjaya Ammál for her maintenance and to enable her to prosecute a suit against the defendant for her maintenance. The defendant affirmed and the plaintiff denied that the said money was borrowed by N. Vijjaya Ammál without any authority from him the defendant to borrow the same and without any necessity on her part for so doing.

The second issue therefore was whether the said N. Vijjaya Ammál had authority to bind the defendant by her said contract.

All the parties were Hindús. It appeared from the evidence of Vijjaya Ammál that she had married the defendant twenty years ago, that they occupied adjoining houses at Mayilappúr (both of which belonged to the defendant), but in other respects had lived as husband and wife down to the occurrence of the events which gave rise to the present action. She asked him for support: he answered "my income from the garden has ceased: you had better borrow and support yourself." He went on for two or three years telling her to borrow. She borrowed money accordingly, and her mother falling sick at Tinnanúr, she went thither. On her return to Mayilappúr she found that her husband had married a second wife without her knowledge or consent: although she had heard a report that he was going to contract a second marriage. She thereupon left her husband. She never afterwards went and asked him to support her, but borrowed money from the plaintiff on the security of the house which she had occupied. There was no evidence that the first wife was unfaithful, ill-tempered, barren or productive only of daughters.

Branson for the plaintiff.

Mayne, for the defendant, contended that the express authority to borrow ceased when the wife deserted her hus-

band. His marriage to a second wife did not justify the first wife in leaving him, and she had therefore no implied authority to bind him for maintenance or necessaries.

1863. *June* 30. *O. S. No.* 85 *of* 1863.

Counsel did not go into any evidence; but as he had not intimated that he did not intend to call witnesses,

Branson replied.

SCOTLAND, C. J.:—In this case the rights of the parties depend on our decision upon the question raised by the second issue, namely whether or not the wife had the authority of her husband, the defendant, to enter into her contract with the plaintiff so as to make the defendant liable for the money borrowed, assuming it to have been lent for necessaries.

On this question the Hindú law appears to rest upon pretty much the same grounds as the English law. A person dealing with a wife and seeking to charge her husband must shew either that the wife is living with her husband and managing the household affairs—in which case an implied agency to buy necessaries is presumed—or he must shew the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance—when of course the law would give her an implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance.

Then as to the evidence. The plaintiff's case is not met by the other side; and we must therefore give his evidence its full and fair effect. Doing so, then, the first question raised is does the plaintiff's evidence establish that express authority was at one time given by the husband to the wife to bind him for necessaries supplied to her? [His Lordship here analysed the evidence and came to the conclusion that such authority was established.] Then the next question is, can we extend the express authority to borrow which the defendant unquestionably gave her before she went to Tinnanúr, and whilst they were living together as man and wife, to the period after her return to Madras, when she was of her own will living apart from him, because he had married a second wife, and for no other reason, or are the circumstances such as to prove that an implied authority existed?

1868. June 30. O. S. No. 85 of 1863.

The evidence shows distinctly that she neither returned to her husband nor made any application to him. According to Hindú law and usage it seems clear that whatever may be thought of the morality of the step amongst Hindús, polygamy is permitted and that it is competent to a Hindú to have several wives. How many wives, as Sir T. Strange observes in his *Hindú Law,* vol. 1, p. 56, it is competent for him to have at one and the same time, does not distinctly appear. The prohibition which is to be found directed against a plurality of wives save under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or production only of daughters, appears to be treated, like so many other rules of Hindú law, as merely directory and not imperative. If, then, in the present case it was permitted to the defendant to supersede his first wife by taking another wife to live with him—and this was her sole reason for refusing to live with him—his doing so did not, according to Hindú law, justify his first wife in separating herself and remaining apart from him of her own free will, and could not without more give her implied authority as his agent to bind him for debts incurred for necessaries. She admitted in her evidence that she never went to him or asked him for maintenance after her return from Tinnanúr, and there is nothing to show any disinclination on his part to receive and provide for her in his family. Her conduct in effect amounted to this—that with wounded feelings as a wife she was disinclined to return to her husband and chose without any communication with him to live apart and borrow money.

We cannot extend to this period an express authority given when she and the defendant were living together in every respect as husband and wife. There being, then, no evidence of any other express authority, and none from which, consistently with Hindú law, any authority can, I think, be implied, the defendant must have a verdict on the second issue.

BITTLESTON, J.:—In cases of this kind the burden of proof lies wholly on the plaintiff. He contracts with one and sues another. He must therefore show that the party with whom he contracted had power to bind the party whom he seeks to charge. By the law of England, in the case of hus-

band and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family. And according to Hindú law, also, a wife has authority to bind her husband by contracting for necessaries in proportion as the management of the family is confided to her. By Hindú law, perhaps, the presumption of authority is not so strong as it is by English law. But it is not necessary now to consider that point, for here the husband and wife were living separate when the contract was made; and if husband and wife are living apart special circumstances must be shewn to raise any implication of authority in her to bind him by her contracts. A Hindú wife is not entitled to maintenance when she voluntarily and groundlessly abandons her husband and lives apart from him. A fortiori, therefore, she has no authority to borrow money for her maintenance. In the present case, there is nothing to justify the wife in absenting herself from her husband, and insisting on her right to maintenance. So far, therefore, as the implied authority goes, the plaintiff's case fails. Then it is said there is evidence of express authority from her husband; but does the evidence make out such an authority as will include this claim? The evidence is of an authority before the separation. While the husband and wife were living together (though in adjoining houses) he said to her "my income from the garden has ceased: you may borrow." Did this warrant her in borrowing 700 rupees for the purpose of instituting a suit against her husband, after leaving him without any reasonable cause? If we held that it did, I think that we should be stretching the express authority too far. The express authority therefore fails as well as the implied authority, and the suit must be dismissed with costs.

Judgment for the defendant with costs.

NOTE.—"Kátyáyana says · Debts incurred for domestic uses, by the slave, *wife*, mother or disciple of one gone to a far country or deceased, and also by his son, must be paid: So says Bhṛgu. "And Yájñavalkya holds: a woman shall not pay debts incurred by her husband or son neither a father those of his son; *nor a husband those of his wife, unless contracted for the benefit of the family,*" *Vyahavára Mayúkha*, chap. V, sec. IV, § 20: And see per Devala cited ibid. chap. IV, sec. X, § 11. 1 Coleb. Dig. 303: Coleb. Oblig. 28, 29.

Appellate Jurisdiction (a)

Special Appeal No. 83 *of* 1862.

MUNDA CHETTI.........................*Appellant.*

TIMMAJU HENSU.......................*Respondent.*

Division of family property cannot be enforced by one of the members of a family governed by the law of *A'liya Santána.*

In Canara females only are recognized as the proprietors of family property.

Per Holloway, J.:—The *A'liya Santána* system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females.

1863. July 9. *S. A. No.* 83 *of* 1862.

THIS was a special appeal against the decree of the Principal Ṣadr Amín's Court of Mangalore in Regular Appeals, Nos. 381 and 393 of 1861, modifying the decree of the District Munsif's Court of Mangalore in Original Suit No. 1252 of 1859. This suit was brought by a female member of a family governed by the rule of A'ḷiya Santána to enforce a division of family property.

Tirumalácháriyar, for the appellants, the defendants, contended that the division sought by the plaintiff was illegal as contravening the law of *Bhútáḷapáṇḍiya.*

Sríniváśácháriyár, for the respondent, the plaintiff.

FRERE, J.:—This was a suit for the division of family property in the district of Canara, and for the recovery of a moiety claimed by the plaintiff, a female.

The District Munsif passed judgment in favour of the plaintiff generally, but disallowed her claim to the land No. 2, on the ground that it was shewn to be the self-acquired property of the second defendant.

Both parties appealed against this decision, and in modification of the original decree, the Principal Ṣadr Amín, Ganappáya, now deceased, awarded to the plaintiff the entire lands claimed in the plaint, being of opinion that the point of self-acquisition had not been substantiated by satisfactory evidence.

The defendants have now preferred a special appeal from this judgment. On the case coming on for hearing it was urged by the vakíl for the defendants, now special appellants, that in families in Canara in which inheritance is governed by the "A'ḷiya Santána" rules, division of family property cannot legally be enforced. Adverting therefore

(a) Present Frere and Holloway, J J.

1863. July 9. S. A. No. 83 of 1862

to the fact that neither the District Munsif, nor the late Principal Ṣadr Amín had pronounced any opinion on this point, the High Court resolved to forward an issue to the Civil Judge, under section 354 of the Code of Civil Procedure, with instructions to take evidence with respect to the existing custom and usage, and to decide the above point judicially.

In his return made under date 26th February last, the late Civil Judge observed that such division of family property had been allowed in numerous suits since the year 1825, and has submitted these decrees for the information of the High Court. The late Civil Judge has also furnished copies of the written opinions of experienced officers in the District of Canara, which, however, do not partake of the nature of evidence, and are not therefore such as now require particular notice.

On the important question now before us, it is necessary in the first place to remark that the practice of the division of family property at the instance of individual members is undoubtedly at direct variance with the ancient law on the subject. It is admitted that the law-book called after Bhútálapándiya constitutes the basis of the Áliya Santána system, which prevails in Canara; and in a portion of this book which is quoted by Mr. Findlay Anderson in his decree in Appeal No. 82 of 1843, such division is repeatedly prohibited, and in express terms(a). It remains therefore to con-

(a) This is the quotation:—"The eldest child of the eldest sister, be it male or female, is to be the *yajamána* (manager) and is to hold the property as such; but it cannot be divided among the family. The remaining members are to act under the authority of such female or male manager. If a disagreement takes place between the sisters, the elder sister is to provide the younger sister with a separate house and its necessary apparatus, retaining the general managership and the performance of ceremonies. But no division of property can be made. To the dignities of chief families held by the Manager of the senior branch the members of his own *santána* will on his demise be entitled to succeed. Those of the junior branch shall have no right. If all the members of the senior branch be extinct, then those of the junior will have a right. The husband is not permitted to confer upon his wife any gifts but the marriage present—if he give one pice *(sic)* more, the family may resume it. The father may give whatever self-acquired property he likes, but no ancestral property to his children. This his private property may be inherited by his children. On failure of collateral descendants a female of the same *bulli* must be adopted. Males cannot be adopted. From failure of heirs áliya santána estates cannot be sold, nor transferred to the wife's children. He must adopt a female who is to inherit the property. If a family becomes extinct without such an adoption, the elders of the caste should assemble and adopt another couple of people from the same lineage, whose offspring then succeeds to the property."

1863. July 9. S. A, No. 83 of 1862.

sider whether this ancient law, which is in conformity with that of Malabar, has been superseded by any custom or usage which has by long prescription or otherwise, acquired the form of law.

On a full consideration of the papers before us, we are of opinion that this question must be decided in the negative. Of the decrees submitted by the late Civil Judge several award division in favor of males, and are thus clearly opposed to the local law as now settled in the district of Canara. In none does the question of compulsory division between the females who alone are now recognized as the proprietors of the family estate, appear to have been judicially tried and decided. It is true that in his decree No. 82 of 1843, in which he quotes Bhútálapáṇḍiya as already noticed, Mr. Findlay Anderson, the late experienced Judge of Mangalore, has expressed an opinion, in favor of such division, but simply on the ground of expediency, for he admits that it is contrary to the intent of the Áḷiya Santána law; and it is important to observe that the question at issue in that case was not that of division between females, but of the respective rights of a male and female member of the same family, so that the judgment can form no precedent as respects the point now under consideration.

In suit No. 376 of 1833 also quoted by the Civil Judge, the suit was not for division but for recovery of the self-acquired property of the plaintiff's male cousin Dummatikarré. It was finally decided that the property should be divided between the four branches of the family, but this was by express agreement between the counsel of the several parties, and in this case therefore also it is clear that the result can form no precedent for the present case.

On a review therefore of the entire subject, we arrive at the conclusion that the ancient law which prohibits any compulsory division of the family estate in Canara generally, has not been in any way legally abrogated or superseded; that the decree of the late Principal Ṣadr Amín in the present case must consequently be reversed, and the claim of the plaintiff disallowed, with all costs of suits.

1863. *July* 9. *S. A. No.* 83 *of* 1862.

Holloway, J. :—It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities upon which the A'liya Santána system of inheritance rests. It is equally opposed to the principle of that system which vests the property in the females of a family. This system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females. If this indisputable rule had been abrogated by decisions of the highest Court of appeal upon the question distinctly raised before it, how much soever I should have lamented that judges had overstepped their proper duty of declaring law, I should as in the case of Hindú wills, have followed such decisions. Here, however, the only decisions produced are those of inferior courts evidently influenced by their views of expediency in the particular cases before them, and still more singularly decisions in which, while violating the law, those Courts have admitted its existence.

Decisions dividing family property have also been passed in Malabar, and it is one of the claims of our late colleague, Mr. Justice Strange, upon that respect which we all feel for him, that he successfully resisted the attempts of lower Courts also acting upon their own views of expediency to introduce foreign admixtures into a law of which, whatever may be thought of the policy, none can deny the consistency with the theory upon which it is based. The divisibility of family property in Canara is one of those propositions which fall within the category of law taken for granted, and is found when examined to have no solid foundation. The evidently moral precept to give women who cannot agree with the rest, subsistence out of the house, is not only no authority for this claim to compulsory division, but is a positive authority against it. If sitting here, I were justified, as I am not, in considering mere questions of policy, it would not, I think, be difficult to shew that this rule of non-divisibility is beneficial in a condition of property such as that of Canara. I adhere most strongly to the opinion that where a rule of law indisputably exists, it is the duty of judges not to fritter it away upon the specious pretence of bringing rules of law into

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harmony with what they may consider the requirements of society. If they are wrong in their view of such requirements, as is by no means unlikely, the evil done is unmixed: if right, the mischief still predominates over the good, because it prevents that systematic reform from which alone good can result. Such systematic reform is for the legislature.

Finding, as I do, that positive rule in this case, the result is that, in my opinion, in this and all the other cases depending on the same question, the decrees below must be reversed and the original suits be dismissed with costs.

Appeal allowed.

NOTE.—This decision was followed in S. A. No.12 of 1862.

As to the *A'liya Santána* (from Karn. *áliya* 'son-in-law' and Skr. *saṁtána* 'offspring') see Chamier's *The Land Assessment and the Landed Tenures of Canara*, Mangalore, 1853, pp. 16, 86, where it is stated that the rule was introduced into Canara about the beginning of the 13th century, and T. L. Strange's *Manual of Hindú Law*, 2d. ed. § 404. The work attributed to Bhútálapáṇḍiya, who is said to have lived in the beginning of the era of Sálivahana (A. D. 78), though printed in Canarese, is still untranslated into English.

Original Jurisdiction (a)

Original Suit No. 84 *of* 1863.

LO'GANA'DA MUDALI *against* RA'MASVA'MI and others.

Where a sale of landed property was made by a Hindú widow and administratrix to the estate of her deceased husband:—*Held* that she had power to dispose of the land for any purpose for which as administratrix she might properly do so.

Held also that an improper disposal of the property was not to be presumed against a purchaser from her, but that the sale must be taken to be proper and valid unless it appeared that to the purchaser's knowledge she was for an unlawful purpose converting the estate.

Held also that she having the right to sell as administratrix it could not be presumed that she sold as widow.

1863. July 1 & 10. O. S. No. 84 of 1863.

THE question in this case was as to the validity of a sale of two gardens within the limits of Madras, which formerly belonged to one Appávu, by Kunram Shaṇmuga Ammál his widow and administratrix to his estate and also to that of his father Venkaṭáchalam. The plaintiff, the purchaser's administrator, sued for possession of the gardens and for an account and payment of the mesne rents and profits received by the first and third defendants, from the

(a) Present Scotland, C. J., and Bittleston, J.

29th August 1859. The following translation of the instrument of sale was filed by the plaintiff and marked B.

"On the 26th day of the month of July of the year 1851, the bill of sale of gardens was written and given to Ponnéri Periya Çrínivása Mudali residing at Chennapaṭṭaṇam (Madras) by Kunram Shaṇmuga Ammáḷ who is residing at Vaṇṇára Péṭṭai (or Washermen's Pettah) attached to the aforesaid Chennapaṭṭaṇam (Madras) and who has obtained administration to the estate of the deceased Kunram Chellapa Venkaṭáchala Mudali. If you ask what:—

The Garden and Bungalow which have number eight and which are situated in Darmarája Kóvil Street of Washermen's Péṭṭai on the southern side of the garden of the aforesaid Darmaraja Kóvil (Pagoda) and my large garden which is situated in Ellaiya Mudali Street within these (namely) to the east of the garden of the aforesaid Ellaiya Mudali to the south of the garden of Chintáddiri Péṭṭai Perumál Kóvil (Pagoda) and to the north of the street of Nambuḷaiyan, I have this day finally sold to you for the sum of rupees 4,300. The sum of rupees 4,200 is due to you by me in the matter of Mr. Johnson. And the sum of rupees 100 was this day received by me in ready money. Total rupees 4,300. I have received the same and delivered the aforesaid two gardens to you. Therefore you yourself are at liberty to use and enjoy the fruit-trees, wood-trees, water, treasure, stone and all others standing thereon from son to grandson and so on in succession. In this manner the bill of sale was written and given with my voluntary consent.

This × mark is the hand-mark of
KUNRAM SHAṆMUGA AMMA'Ḷ.

Witnesses to this

MUCHI PA'RTASA'RADI AYYAṄGA'R, I know.
K. TIRUVE'ṄGADA MUDALI, I know.

In this manner, this was written by Rajunáda Samuddiram Sésha Ayyaṅgár."

The following issue was settled by Bittleston, J.:— On the 1st June 1863, the plaintiff affirms and the defendants second, third, fourth, fifth, sixth, seventh and tenth

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deny that on or about the 26th July 1851, one Shaṇmuga Ammál in the plaint mentioned sold and assigned to Ponnéri Periya Srínivása Mudali for valuable consideration the two gardens in the plaint mentioned with the buildings thereon and afterwards on or about the 30th March 1855, by another instrument in writing and also by her will of that date confirmed the said sale. The issue therefore is whether the said gardens were so sold and assigned to the said sale so confirmed as in the plaint alleged.

On the 26th June 1863, the following additional issue was settled by Bittleston, J.:—" Whether the said Shaṇmuga Ammál at the time of the execution of the said assignment of the 26th day of July 1851, or at the time of the execution of the agreement and will of the 30th day of March 1855 had any right, title or interest in the said property which she could lawfully assign.

The evidence sufficiently appears from the judgment.

Mayne, for the plaintiff, contended that the Court would not presume against a purchaser from the administratrix that the land had been sold improperly. A third person, if there is no more in the transaction, is justified in assuming that the sale is for those purposes for which the law gives an executor or administrator the power of sale, *McLeod* v. *Drummond(a)*, *Elliot* v. *Merriman(b)*, *Scott* v. *Tyler(c)*, Wms. Exors. 5th ed. 840. He also submitted that as the widow had a right to sell as administratrix, it would not be presumed that she sold as widow, in which capacity she was prohibited selling except for certain specified purposes.

Branson for the defendants.

Mayne replied.

The Court took time to consider, and on the 10th July its judgment was delivered by

SCOTLAND, C. J.—In this case, the plaintiff sues as the administrator of the estate of P. Srínivása, his deceased father, for possession of the gardens in the plaint mentioned and alleged to have been sold and assigned to the said P. Srínivása by Shaṇmuga, on the 26th July 1851. The

(a) 7 Ves. 152.
(b) 14 Ves. 353, 360; 17 Ves. 153, 154.
(c) 2 Atk. 41.

plaint also prays an account of the rents and profits from 29th August 1859.

The title of the plaintiff, as far as documentary evidence is concerned, excepting the agreement for the cocoanut trees, depends upon the assignment; and it was not disputed at the hearing, (though in the defendants' written statement it is expressly denied) that in point of fact, Shaṇmuga did execute the bill of sale marked B, to Srínivása. The contention was, that nothing passed by that instrument, as Shaṇmuga had no right nor title which she could so convey.

It appears to be agreed that these gardens were originally the property of Venkaṭáchalam, the grand-father of Appávu; and that upon Venkaṭáchalam's death the property vested in Appávu. Appávu died in November 1845, within a month after the death of Venkaṭáchalam, and in the year 1848 administration was granted to Shaṇmuga the widow of Appávu, first, of Venkaṭáchalam's estate in the month of March, and, secondly, of Appávu's estate in July. So that it is clear that at the time of the sale to Srínivása, this property was held by Shaṇmuga in her representative capacity; and she had authority to dispose of it for any purpose for which, as administratrix, she might properly do so. Further, an improper disposal of it is not to be presumed against a purchaser from her. On the contrary, the sale must be taken to be proper and valid, unless it appears that to the knowledge of the purchaser, the administrator was for an unlawful purpose, such as the payment of the executor's own debt, converting the estate into money. As put by Sir William Grant in *Hill* v. *Simpson(a)*: "It is true that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance that they are executors will not vitiate any transaction with them; for the power of disposition is generally incident, being frequently necessary; and a stranger shall not be put to examine whether, in the particular instance, that power has been discreetly exercised. But from the proposition that a third person is not bound to look to the trust in every respect and for every purpose, does it

(a) 7 Ves. 166.

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follow that dealing with the executor for the assets he may equally look upon him as absolute owner and wholly overlook his character as trustee *when he knows the executor is applying the assets to a purpose wholly foreign to his trust?*"

The question here is, whether upon the evidence as it now stands, we can say that this was at all a case of application of the assets, not as administratrix and to a purpose foreign to the trust?

As to the instrument itself, it seems to us that it would be very unsafe to draw from its language the same inferences as might reasonably enough be drawn from similar expressions in an English conveyance, and because the document B expresses the consideration to be in part a past debt "due *by me to you* in a matter of Mr. Johnson" to hold, therefore, that the sale of the gardens was in satisfaction of her own personal debt.

Of the real facts of the transaction, we know little or nothing.

Párttasáradi Ayyangár, who was present at the execution of B, states that on that occasion, Shaṇmuga said "I owe money to Srínivása, I have written a document and sold my gardens to him. I owed money to Johnson, and Srínivása undertook to pay and has paid it." But not in this statement, any more than in the document itself, can we attach any weight to the use of the personal pronoun; and the evidence of Aṇḍiyappa Mudali, so far as it goes, tends to show that she was probably paying off debts due from the estate—for he says that Appávu died largely in debt, and that a person named Johnson actually received rupees 15,000, on account of Appávu's debts. Whether these debts were incurred by Appávu himself, or devolved upon him as a charge on the property, we are not called upon to consider.

It is true that Aṇḍiyappa says that the money paid by Srínivása was in respect of Evatt's action, and that he had nothing to do with the payment of the rupees 15,000 to Johnson. But to rely upon that statement, in opposition to the words of the instrument, which apparently connects Srínivása with the debt due to Johnson, would be very un-

satisfactory, there being no suggestion of more than one debt of Johnson's, and no evidence of the particular circumstances attending the payment of Johnson's debt; and whether the debt due to Srínivása was on account of money paid to Johnson, or on account of money paid to Evatt, it seems not improbable that it was in either case in respect of a debt due from the estate.

It is not to be forgotten that under this sale, according to the evidence, Srínivása and his brother continued in possession of the property down to August 1859,—and bearing this alone in mind, we think that at this distant time it would be a very rash presumption from anything which appears in evidence before us, to infer that the sale by Shaṇmuga was in violation of her duty as administratrix. She describes herself in the deed as the administratrix of Venkatáchalam, as in truth he was; but we do not think that any unfavourable inference can be drawn therefrom, nor do we think that the omission to describe herself in the instrument as the administratrix of Appávu can deprive that instrument of effect if, in fact, she had authority, as the administratrix of Appávu's estate, to sell and assign the property. There is no ground for supposing that she, in fact professed to assign in any other right than the representative character which really belonged to her—(for all the circumstances were probably just as well known to Srínivása as to herself); and, certainly, the description of herself in the instrument as administratrix of Venkaṭáchalam, (her husband having survived Venkaṭáchalam only one month), is opposed to the supposition that she was selling the property in her own independent right as owner?

Further, as a matter of presumption, we cannot infer that, having the right to sell as administratrix, she sold, not in that capacity, but as widow, in which latter capacity the law prohibited her from selling; and it was not necessary to the validity of the assignment by her, that the instrument should describe the character in which she assigned. So far as we can judge the transaction may have been, and probably was, a perfectly legitimate one by her as administratrix, and no attempt has been made in this case, by evidence on the part of the defendants, to show that she was disposing

1863. July 1 & 10. O. S. No. 84 of 1863.

of any part of the property, obtained through her husband, in payment of her own debts, or for any other improper purpose.

The plaintiff, therefore, is entitled to possession of the property claimed in the plaint, and as a consequence, he is further entitled to an account of the rents and profits since August 1859.

It is certainly desirable for the interests of the parties that they should agree as to the amount of those rents and profits. And it is probable that they will do so, otherwise there must be a reference to the Commissioner to take the account.

The plaintiff is entitled to the costs of the suit so far.

Appellate Jurisdiction (a)

Special Appeals Nos. 382 *and* 383 *of* 1862.

MUHAMMAD MOHIDI'N..................... *Appellant.*

OTTAYIL UMMACHE and another......... *Respondents.*

He who would disaffirm a contract entered into by mistake must do so within a reasonable time and will not be allowed to do so unless both parties can be replaced in their original position.

A vendor legally conveying all his title cannot be sued for money had and received although the title prove defective.

Accordingly where the plaintiff bought two kánam claims and sued upon them unsuccessfully:—*Held* that he could not recover the purchase-money from his vendor's representatives on the ground that the consideration for the payment had failed.

1863. July 11. SS. AA. Nos. 382 and 383 of 1862.

THESE were special appeals from the decision of H. D. Cook, the Civil Judge of Calicut, in Appeal Suits Nos. 15 and 16 of 1861, affirming the decrees of the Ṣadr Amín of Calicut in Original Suits Nos. 327 and 328 of 1859.

Ritchie for the appellant, the first defendant.

Brockman for the respondents, the first and second plaintiffs.

The facts appear from the following judgment, which was delivered by

HOLLOWAY, J. :—In these two cases, the plaintiff alleges that he purchased two kánam claims of a woman named Ayesha whose representatives the defendants are alleged to

(a) Present Phillips and Holloway, J J.

1863. *July* 11. *S.S. A.A. Nos.* 382 *and* 383 *of* 1862.

be, and that he sued upon them and was defeated; and he now seeks to recover the purchase-money with interest from the defendants.

The substantial defendants answered that the instruments of sale were not properly executed.

The lower courts found that they had been executed by the necessary parties ; but gave judgment for the plaintiff.

These two actions are in effect actions for money had and received and the ground of them is that the consideration for the payment of money having entirely failed, the payer has a right to recover it. It is perfectly consistent with the plaintiff's allegations that the kánam claims of the vendor were perfectly valid, and it is at any rate clear that whatever title the vendee had, was conveyed to him, and that so far from disaffirming the contract, he proceeded to sue as her assignee, and it is only when defeated that he seeks to recover in a suit shaped as this is.

The principle that he who would disaffirm a contract entered into by mistake must do so within a reasonable time, and will not be allowed to do so unless both parties can be replaced in their original position, is as well established as it is manifestly equitable. We approve of and adopt the rule at Wms. Saunders 269 *d.*

It is clear that this is not such a case. The assignor of this kánam has lost whatever cause of action she possessed by the suit of her assignee.

It is quite clear that such an action could not in English law be maintained. Lord Alvanley in *Johnson* v. *Johnson*(a), points to the real distinction. "We by no means wish to be understood to intimate that where under a contract of sale, a vendor does legally convey all the title which is in him, and the title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper coven-

(a) 3 Bos. & Pul. 170, and see *Cripps* v. *Reade* 6 T. R. 606 : *Bree* v. *Holbech*, Doug. 654. That the purchaser cannot recover the purchase-money in equity when the conveyance has been executed by all necessary parties, and he is evicted by a title to which the covenants do not extend, see *Serjt. Maynard's case* Freem. C. C. 1 : *Anon.* ibid. 106 : *Thomas* v. *Powell* 2 Cox 394 and *McCulloch* v. *Gregory* 1 K. & J. 291 per Wood V. C.

1863. July 11. SS. AA. Nos. 382 and 363 of 1862.

ants: where the vendor's title is actually conveyed to the purchaser the rule of *caveat emptor* applies."

It is quite clear that this is just the case supposed.

If this were a mere technical matter of the form of the pleadings, we would not allow the objection to prevail: here however, it is manifest that the form of the action seriously affects the defence. It may well be, for anything here alleged, that the káṇam is a perfectly valid one, that the vendee agreed to purchase it with all defects, and that the action in which he failed to get it established was fraudulently instituted. We are also sensible of the dangerous and demoralizing effect of proceedings which would sanction the litigious inhabitants of Malabar in speculating in the purchase of doubtful titles to litigate upon them and in feeling secure that even if they fail, they will be allowed to recover the whole of the nominal purchase money; for in all these cases long experience has satisfied us that the sum nominally paid is either entirely fictitious or greatly exaggerated.

We are satisfied that the rule of English law is as beneficial as it is plain, that the right to disaffirm the contract had been lost by the conduct of the plaintiff, that this action for the return of the purchase-money will not lie, and that the decrees of the Courts below must be reversed, but without costs.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 168 *of* 1863.

ABHA'CHA'RI........................*Appellants.*

RA'MACHENDRA'YYA.......................*Respondent.*

By Hindú law a man may make a gift of any of his property binding as against himself.

Even when a deed of gift is voidable on the ground of fraud, accident or mistake, it is a question for the discretion of the Court whether cancellation or delivery up ought to be ordered.

Courts of Equity strongly incline against remedying mere mistakes of law.

Where a Hindú made a gift to a person whom he said he had taken as his *manasuputra*:—*Held* that he could not set it aside on the ground that he erred in supposing that the donee could perform his funeral rites.

1863. *July* 25. *S. A. No.* 168 *of* 1863.

THIS was a special appeal from the decision of Srínivása Rau, the Principal Ṣadr Amín of Mangalore, in Appeal Suits Nos. 343 and 344 of 1862, confirming the decree of the District Munsif of Bekal, in Original Suit No. 25 of 1860. This suit was brought to cancel an instrument of gift (exhibit X) executed by the plaintiff in favour of the defendant, of which the following is a translation :—

"Sarva Svatantra mukhtyárnáma (deed transferring right) executed by Rámachendráyya, younger brother of Balaiya Senabhog, residing at Ajámír village, Alvatnad Magane, Bekal ta'aluk, on the 4th Sravanabahula of Rakshasa (31st August 1855,) in favour of Abhácbári, son of Tirupati Giriyácbárya, residing at present at Kasargod.

My wife died after having an issue, and I have not married a second time and so remain sonless. I have also grown 65 years old and have none in my family so as to manage the real and personal property belonging to me, to protect me during my life-time, to continue the line of my family and perform my obsequies after my death. Consequently, this day I have taken you as my manasuputra *(b)* and have made over to you the moveable and immoveable property belonging to me, of which the particulars are as follows :—

(Here enter the same).

You are to enjoy the said moveable and immoveable property, to remain with your family in the house in which I now live, to maintain me *and perform my obsequies after my demise.* According to a separate paṭṭi given to you under my signature respecting the debts due by me upon these lands and the debts due *to* me you are to conduct proceedings to redeem the lands, to enjoy for generations the said

(a) Present Phillips and Holloway, J J.

(b) From Can. *manasu* (borrowed from Skr. *manas* μένος) and *putra* 'son.'

1863. July 25. S. A. No. 168 of 1863.

moveable and immoveable properties free from all hindrances. You should also get the registry transferred in your name in the sarkár (accounts) and continue to pay the tírvai after causing an entry to be made thereof in kudutate accounts. I declare that if I observe the honours hitherto enjoyed by me and collect in your name the debts due by others, I would have no claim at all thereto and would not raise any objections regarding the same. Thus do I execute this mukhtyarnáma of my own conscience."

The donee was more than fifty years old and not of the plaintiff's gotra; and the plaintiff's ground for setting aside the gift was that he had erred in supposing that the donee could perform his obsequies.

The Principal Şadr Amín's judgment contained the following passage:—"As the mukhtyarnáma, exhibit X, executed by the plaintiff to the defendant, and which forms the basis of this suit, shows that the plaintiff adopted the defendant as manasuputra and transferred to him on that account his right to the estate, an interrogatory was sent to the paṇdits of the High Courts, together with the copy of the mukhtyarnáma, for their opinion as to whether the adoption of manasuputra and the mukhtyári deed passed by the plaintiff to the defendant, can be held valid under Hindú law. With reference to the said interrogatory, the paṇdits gave their answer stating that manasuputra is not at all known to the Hindú law; that the adoption of the defendant by the plaintiff as his manasuputra or the mukhtyári deed executed on that account, cannot be held valid under Hindú law; and that among the people of the same caste the difference of sect or gotra would not be a bar to the performance of funeral obsequies.

"The defendant not having any distinct right by heirship, &c., based it solely on the said mukhtyári deed: but as this deed is invalid under Hindú law, it is not necessary to consider in length the arguments set forth by him."

Saḍagópáchárlu, for the special appellant, the defendant, contended that the gift was binding. There was no fraud in this case. Even if the donor erred in supposing that the donee could perform his funeral rites, that was no ground for setting aside the gift.

Srínivásácháriyár, for the special respondent, the plaintiff.

The court delivered the following

1863. July 25: S. A. No. 168 of 1863.

JUDGMENT:—This suit was brought to procure the setting aside of a voluntary deed of gift executed by the plaintiff to the defendant on the grounds that plaintiff found that it would be improper for defendant to perform his obsequies, and that he had not lived with the plaintiff since execution of the deed of gift.

The defendant answered among other things that he had managed the affairs of the plaintiff since the execution of the deed.

The Munsif and Principal Ṣadr Amín decreed for the plaintiff, mainly on the ground that the consideration had failed, and the defendant appealed from that decision.

This is not a case of the donee seeking to enforce a contract, it is one of a donor seeking the cancellation of his own voluntary deed. Nothing is clearer than the proposition that by Hindú as by English law, any man may make a gift of any of his property binding as against himself. The jurisdiction of a Court of Equity to set aside deeds is most beneficial. It is however to be exercised on certain principles now perfectly well-established. Moreover, even where the deed is voidable on the ground of fraud, accident or mistake, it is always a question for the discretion of the court whether cancellation and delivery up ought to be ordered.

Here a man seeks to set aside his own deed on the ground that he made a mistake in supposing that the defendant could perform his funeral rites, and on the ground that certain things which cannot possibly be construed as conditions precedent, have not been done by the defendant. It is quite clear from his own language that the plaintiff was well aware that he was not, and could not be adopting a son. He says that he will consider defendant a manasuputra.

In modern times the Courts of Equity have strongly inclined against remedying mere mistakes of law, but

1863. July 25. S. A. No. 168 of 1863.

without saying that in no case can an equitable remedy be given, it is quite clear that this is not a case for the exercise of such a discretion. The case is simply one of the plaintiff choosing to alter his mind; he has shewn no equity whatever, and without giving any opinion whatever as to the validity or effect of the deed, it is quite clear that the decrees setting it aside must be reversed with costs.

Appeal allowed.

NOTE:—See as to Hindú gifts *Vyavahára Mayúkha*, chap. IX: 2 Coleb. Dig. 94, 95, 96.

Appellate Jurisdiction (a)

Regular Appeal No. 4 of 1863.

RA'MAGOPA'L........................*Appellant.*

MAJETI MALLIKKARJANUDU .....*Respondent.*

Questions as to set-off will be dealt with in this Court upon the principles of English Courts of Equity or of the Roman law of Compensation, and no weight will be given to objections derived from the peculiar language of the statutes of set-off.

1863. August 1. R. A. No. 4 of 1863.

THIS was a regular appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 3 of 1862.

The suit was brought by the plaintiff for rupees 2,060-0-8, the balance due upon an account stated.

The defendant pleaded that he was entitled to set-off the amount of a hundí which he had paid. The hundí was in the following terms:

"*Every thing must be safe in Masulipatam.*

From Setnumin Sitarám, residing at Husen Sagaram, to Majeti Mallikkarjinudu, at Masulipatam.

I have drawn a hundí on you for rupees 1,000 (the moiety thereof being rupees 500.) The person that paid the said money, is Muḥammad Vazír Sandagar. The payment should be made within 15 days from 8th Vaisakha Sudda to Name Shahajugu, *i. e.* to the person who brings this.

It is written that the above sum should be debited in the accounts of Khata Saligram Sadasivabhattu at Jaggaiyapet.

8th Vaisakha Suddha of Guzarati Samvat year 1918.

(a) Present Frere and Holloway, J J.

1863. *August* 1. *R. A. No.* 4 *of* 1863.

As soon as you see this hundí, you should write an answer.

1000

Rupees one thousand should be paid by four instalments of 250 rupees each forming one-fourth (of thousand rupees)."

The plaintiff admitted that he would have been responsible for the amount if the defendant had not negligently omitted to enquire into the payee's solvency. And the Civil Judge decided that the defendant was entitled to set-off this amount, because the defendant was not, as the plaintiff contended, bound to make such enquiry.

The defendant specially appealed.

Mayne, for the appellant, the defendant, objected that the hundí did contain an implied provision for enquiry into the payee's solvency. He also contended that whether this were so or not, the amount was not pleadable as a set-off.

The Acting Advocate General (Norton), for the defendant, was not called upon.

The Court delivered the following

JUDGMENT:—The document clearly contains no such condition as Mr. Mayne supposes. It is a perfectly unrestricted order to pay. Upon these papers it is difficult precisely to understand the circumstances of the parties to this hundí, or whether the amount of the bill would be, at English law, pleadable as a set-off. It is very probable that it would not be so. In this Court, however, should the question arise, we should deal with it rather upon the principles of English Courts of Equity or of the Roman law as to Compensation from which those doctrines are derived*(a)*. We should certainly give no weight to objections derived from the peculiar language of the statutes of set-off—language that has produced results of the most grotesque and mischievous character which recent legislation has partially remedied.

Here we must take the case as the parties themselves put it by their pleadings and their conduct of the cause. It is quite clear that the plaintiff admitted that he would

(a) Freeman v. Lomas, 9 Hare, 1 13: Mack. Syst. Jur. Rom. 749.

1863. August 1. R. A. No. 4 of 1863.

have been responsible for the amount due if the defendant had not negligently omitted an enquiry which he was bound to have made. It is quite clear therefore that the parties dealt upon the principle of setting off against one another demands of a varied character, and the plaintiff having wholly failed to establish the negligence which he has set up, the decree of the Court below is clearly right and this appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 75 *of* 1863.

TA'ṆḌAVARA'YA MUDALI............*Appellant.*

VAḶḶI AMMA'Ḷ..........................*Respondent.*

A debt incurred by the head of a Hindú family residing together is under ordinary circumstances presumed to be a family debt.

But when one of the members is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *bona fide* and for the benefit of the family.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree* (6 Moo. I. A. Ca. 393) followed.

1863. August 6. S. A. No. 75 of 1863.

THIS was a special appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Appeal Suit No. 69 of 1862, reversing the decree of the District Munsif of Dindigul in Original Suit No. 956 of 1860. This suit was brought to recover certain lands, the property of an undivided Hindú family, which had been mortgaged to the plaintiff by the first defendant, who was the elder brother of the second defendant and the managing member of the family. At the date of the mortgage the second defendant was a minor. No evidence was given by the plaintiff, that the mortgage had been made for the benefit of the family.

Mayne, for the appellant, the third defendant, contended that under the circumstances the burden of proof that the debt was for the benefit of the family lay on the plaintiff, and cited *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(b).

(a) Present Phillips and Frere, J J.

(b) 6 Moore I. A. Cases, 393.

The Court delivered the following 1863. *August 6.*

S. A. No. 75 of 1863.

JUDGMENT:—This is a claim for land under a mortgage-bond said to have been executed in favour of the plaintiff by the first defendant in the year 1851, during the minority of the second defendant the younger brother of the first. It was stated in the plaint that on the 30th October of the above year the first defendant borrowed rupees 250 from the plaintiff, and assigned to her the lands in question as security for payment.

The second defendant resisted the claim, on the ground that the land was his own property and that the suit was collusive.

The District Munsif was of opinion that in the absence of any proof that the sum was borrowed for family purposes, the family property belonging to the two undivided brothers, the first and second defendants, could not legally be held liable for the plaintiff's bond, and accordingly dismissed the suit. This decision was, however, reversed in appeal by the Civil Judge who passed judgment in favour of the plaintiff's claim, on the ground that the debt which was incurred by the first defendant the elder brother and head of the family, must be presumed to be a family debt, for which the second defendant and the family property must be held liable.

We see no reason to question the doctrine laid down by the Civil Judge in this case, as regards a family of brothers or other coparceners resident together under ordinary circumstances; but in the present instance we observe that the Civil Judge has omitted to notice an important feature in the case, that the only coparcener of the first defendant whose rights are affected by the act of the latter, was, according to the plaintiff's own statement, a minor at the time of the execution of the bond, and unable consequently to protect his own interests. Adverting therefore to the nature of the pleas urged by the second defendant we consider that on the principle enunciated in the case *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(a), it was incumbent on the plaintiff to adduce some proof that the debt was contracted *bonâ fide*, and for

(a) 6 Moore I. A. Cases, 393.

1863. August 6. S. A. No. 75 of 1863.

the benefit of the family; but this she has altogether failed to do. We resolve therefore to modify the decree of the Civil Judge, and to pass judgment for the amount there stated against the first defendant personally, with all costs of suit.

Our decree will thus relieve the second defendant as well as the lands in question, from all liability on account of the decree.

Appeal allowed.

Original Jurisdiction (a).

Original Suit No. 94 *of* 1863.

A'RUMUGAM MUDALI *against* AMMI AMMA'L.

Under a bequest by a Hindú of ten rupees per month, followed by a direction to the following effect: "in this manner continue to pay in the legatee's name so long as he shall be alive: after his death continue to pay the same to his descendants from generation to generation."

Held:—1st. That the legatee took only a life-interest under the bequest.

2nd. That the words "from generation to generation," did not import more than "absolutely" and "for ever" import in an English instrument.

3rd. That the descendants in existence at the time of the tenant for life's death took absolutely as a class; and

4th. That such descendants were entitled in equal shares to an amount sufficient to produce the monthly sum of ten rupees.

Remarks on the construction of Hindú wills.

'Descendants' of A in a Hindú will would include children and grandchildren living at his decease but does not include A's brother or widow.

There is no rule of Hindú law imposing any restriction in point of time on the operation of a bequest creating a series of successive life interests in each generation of a legatee's descendants. But

Semble the grounds of the rule against perpetuities are applicable to the property of Hindús and the Court will be very reluctant to construe a Hindú will so as to tie up property for an indefinite period.

1863. June 30, August 4 & 7. O. S. No. 94 of 1863.

THE plaintiffs P. A'rumugam Mudali and his wife Sundaram Ammál by her husband and next friend sought to recover rupees 935 from the defendant as sole surviving executrix with probate of Manali Lutchmana Mudali deceased, being the arrears of a monthly sum of ten rupees bequeathed by the testator to M. Shanmuga Mudaliyár deceased and his descendants, due from the end of July 1855, when the last payment was made, to the 19th May 1863, when the plaint was filed.

(a) Present Scotland, C. J. and Bittleston, J.

The plaintiffs also sought, if the Court should be of opinion that the bequest amounted to a gift of an annuity in fee, that an amount sufficient to produce such monthly sum might be paid over by the defendant to the plaintiffs out of the testator's assets.

1863. June 30, Aug. 4 & 7. O. S. No. 94 of 1863.

The female plaintiff was the daughter and only legal personal representative of the annuitant, who died intestate, and all the parties were Hindús.

The bequest in question was in the following terms:—"Continue to pay ten rupees per month to Shanmuga Mudaliyár, the son of T. Lutchu Ammál and just about the time when the said Shanmuga Mudaliyár's son shall intend to marry pay him two hundred and fifty rupees. Pay at the rate of five rupees per month to Gopálakrishna Mudaliyár. Pay three and half rupees per month to Rámasvámi Mudaliyár, the younger brother of Tambu Mudaliyár. Pay five rupees per month to Sabápati Mudaliyár. Pay three and half rupees per month to Vadageri Mudaliyár. Pay three and half rupees per month to Chengalráyan, the son of Séshammál. Pay three and half rupees per month to Gopála the son of Kámátchi Ammál. Pay three and half rupees per month to the son of Periyanáyaga Ammál. In this manner continue to pay respectively in the names of the aforementioned persons so long as they shall be alive: after their deaths continue and pay the same to their descendants from generation to generation."

The case came on for hearing on the 30th June 1863.

Mayne, for the plaintiff, contended that Shanmuga the annuitant either took absolutely, or that if he only took a life interest then that his descendants took absolutely: *Bird* v. *Webster*(a): *Agnew* v. *Matthews*(b): *Ex parte Wynch* (c): *Audsley* v. *Horn*(d).

Branson, for the defendant, submitted that Balakistna, the annuitant's brother, and Mánikka, his grand-daughter, should be made parties as each having an interest.

Balakistna appeared in person and concurred in *Branson's* application.

(a) 22 L. J. Ch. 483.
(b) Supra p. 17: 1 Ind. Jur. 74 S. C.
(c) 5 D. M. & G. 206.
(d) 26 Beav. 195: 1 DeG., F. & J. 226.

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SCOTLAND, C. J. :—Section 73 of the Code of Civil Procedure applies. We cannot say that Balakistṇa and Mánikka have no interest. Let the case stand over for the purpose of making them parties as defendants. Notice must be given to Mánikka. In Balakistṇa's case it is unnecessary. The costs will be considered at the disposal of the case.

The case accordingly stood over till the fourth of August 1863, when Balakistṇa appeared in person, and much evidence, which the construction subsequently given to the bequest renders it unnecessary to state, was brought forward as to whether Shaṇmuga and his brothers were divided.

Norton, for the plaintiff. Shaṇmuga took only a life interest, and on his death the plaintiff Sundaram and the defendant Mánikka became entitled in equal shares to a corpus capable of producing ten rupees a month. Nothing can be more opposed to the testator's intention than that his brother Balakistṇa or other collaterals should take: " descendants" in a Hindú will cannot mean collaterals. So his intention would be defeated if Shaṇmuga's widow took in preference to his daughter and grand-daughter. The widow cannot be considered a " descendant."

By English law Shaṇmuga would take absolutely. But the English cases do not apply. Hindú instruments should not be construed with reference to decisions resting on the effect of the technical words of English law.

BITTLESTON, J. :—What effect do you give to the expression " from generation to generation" ?

Norton :—I submit that it is merely equivalent to " for ever" in an English grant to A and his heirs for ever.

BITTLESTON, J. :—The testator probably intended to create a corpus capable of producing ten rupees a month to be paid for ever to successive descendants of Shaṇmuga. This of course cannot be done by English law. Can it be done by Hindú law ? Would it not be contrary to public policy ?

SCOTLAND, C. J.:—Suppose this case arose on a gift *inter vivos* and not under a will ?

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Norton:—Then possibly the words might be construed as giving Shaṇmuga the absolute interest conditionally on his having descendants, and there is nothing in Hindú law against the efficacy of a conditional gift.

SCOTLAND, C. J.:—I remember nothing in any Hindú law-book recognising the validity of such a gift.

Norton:—Mr. Stokes has been kind enough to refer me to a case in the Madras Ṣadr Judgments for 1860, p. 137, which shows that the late Ṣadr Court would have upheld a gift on condition.

BITTLESTON, J.:—But the gift here is under a will. It is generally agreed that the Hindú law knows nothing of wills, and that the testamentary power has been engrafted by English lawyers on the Hindú jurisprudence. Then, if so, is not such power engrafted with the limitations on its exercise which exist in English law? Here if the legacy vested absolutely in Shaṇmuga it would go to his 'heir,' under which title his widow would take—that is, of course, assuming that he was divided. [His Lordship here referred to the Mitákshará chap. II, sec. 1, and to Elberling's *Treatise on Inheritance, &c.*, sections 153, 164.] If, however, Shaṇmuga was undivided, and if there is no distinction as to property separately acquired by gift or will, his brother Balakistṇa would take.

Branson, for the defendant, merely submitted that he was entitled to costs.

SCOTLAND, C. J.:—We will consider this case.

Cur. adv. vult.

On the 7th August the following judgment was delivered by

SCOTLAND, C. J.:—We are called upon in this case to put a construction upon the words of a bequest in the will of a Hindú testator; and the proper rule of construction by which we must be guided is, we think, correctly laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(a), and acted upon in *Sonatun Bysack* v. *Sreemutty Juggutsundree Dossee*(b). It would be improper and very unsafe

(a) 6 Moore I. A. 5, 150. (b) 8 Moore I. A. 66, 85.

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in construing Hindú wills to follow decisions of the English Courts upon the construction of English wills which are founded upon the peculiar effect ascribed to technical words and to terms ordinarily used by conveyancers with reference to the Real Property law of England.

The bequest which we have to consider in this case is in these words "continue to pay ten rupees per month to Shaṇmuga Mudaliyár the son of T. Lutchu Ammáḷ . . . . " Pay at the rate of five rupees a month to Gopála Kristṇa Mudaliyár" (and so on in like terms to several other legatees). Then "in this manner continue to pay respectively in the names of the aforementioned persons so long as they shall be alive. After their deaths continue and pay the same to their descendants from generation to generation."

This language in an English will would probably be held to give an absolute interest to Shaṇmuga; but the English authorities bearing upon such a construction, depend upon the peculiarities of the English law of property and upon distinctions between real and personal property which are altogether unknown to Hindú law. And the effect of adopting as a rule of construction that a bequest by a Hindú to A and his descendants or children, or issue, must operate to vest an absolute estate in the first taker would be very frequently to defeat the real intention of the Hindú testator. In the present case we do not doubt that the testator's intention would be defeated if Shaṇmuga's brother Balakistṇa were held en titled to take; and this would be the result of applying such rule of construction here if he was undivided, and if the law as to succession between undivided brothers extends to property separately acquired by gift or will, as to which we desire to express no opinion; but we may refer to the case of *Bezan Persad* v. *Mussumat Badha Beeby(a)*, as throwing some light upon the point. So again we think the intention of the testator would be defeated by holding that Vaḷḷi Ammáḷ, the widow of Shaṇmuga, was entitled to take in preference to his daughter and grand-daughter. In using the term "descendants" neither the brother nor the widow could, we think, have been intended. And giving effect, as we must do, to the words of the bequest in terms

(a) 4 Moore. I. A. 174.

limiting Shanmuga's enjoyment of the legacy to the period of his life, we come to the conclusion that the testator's intention will best be effectuated by holding that Shanmuga took only a life-interest. 1863. *June* 30, *Aug.* 4 & 7. *O. S. No.* 94 *of* 1863.

We have next to consider who upon his death became entitled to take as his descendants and what estate or interest they took. The words of the bequest are "continue to pay the same to their descendants from generation to generation." Now the term 'descendants', if it stood alone, would, we think describe the class of persons to be benefited, and would include both children and grand-children living at Shanmuga's death, who would take absolutely. But the question arises as to the effect to be given to the additional words "from generation to generation." If these words are to be construed as creating a series of successive life-interests in each generation of descendants, there is no existing rule of Hindú law that we are aware of, which imposes any restriction in point of time upon the operation of such a bequest; and the fund must be held to be inalienable for all time. Such a result has from an early date been resolutely resisted by English Courts on the grounds of general utility and public convenience; upon which grounds the doctrine against perpetuity rests. The same grounds appear in reason equally applicable to the property of Hindús, nor are they opposed to any of the principles of Hindú law or usage, and the Court would be very reluctant at the present day in dealing with Hindú dispositions of property by will to adopt a rule of construction which would have the effect of tying up property, it may be to a very large amount, for an indefinite period. Can we then in the present case say that the use of the words "from generation to generation," clearly imports an intention on the part of the testator so to tie up his property? In the next clause of the will he uses the same words when disposing of the mírásí share in a village. There he directs the first taker Manela Ráma Mudaliyár to be put in possession and to have a deed given to him expressing that the same should be held and enjoyed *by him*, his sons and grandsons, from generation to generation. The reasonable construction of this clause seems to be that the testator intended to pass the whole interest to Manela Ráma, and if so, we see no reason for giving a different

1863. June 30, Aug. 4 & 7. O. S. No. 94 of 1863.

construction to the same words in the clause in question. On the contrary, considering what the bequest is, namely, ten rupees per month, and how in the course of a few generations the number of descendants would probably be multiplied, there is, as regards this bequest, one more reason for holding that the testator's intention was, that the "descendants" at the time of the death of the tenant for life should take absolutely as a class. The words "from generation to generation" cannot be called technical words: they are not unfrequently used, in common with words of a like kind,—such as, "while the sun and moon endure,"—in Hindú written instruments, and by themselves when so used they do not in their ordinary signification import more than 'absolutely,' and 'for ever.' Upon the use and meaning of such expression we may mention that, we have met with a passage in a minute of Sir Thomas Munro of the year 1822, in connexion with a decision of the late Supreme Court and published in the Appendix to Mr. Gleig's *Life,* in which the words "from generation to generation" are classed with the terms "for ever" and "while the sun and moon endure," and spoken of as mere forms of expression, and are he adds, never supposed by either the donor or the receiver to convey the durability which they imply. This latter observation he makes in commenting upon the decision of the late Supreme Court from which he differed with reference to a royal grant. We only refer to the minute for the purpose of showing that both the Supreme Court and Sir Thomas Munro agree in considering the expression "from generation to generation" as equivalent only to the words "for ever," and "while the sun and moon endure." In this general sense we think the testator used the expression in his will, and that he thereby meant to pass all the interest in the property from himself to the objects of his bounty: and had no reference to the creation of a perpetual series of limited estates or interests for life in successive generations. This conclusion derives some additional support, we think, from the fact that the testator has made no provision for the case of a failure of descendants.

Upon this construction of the bequest it becomes unnecessary to advert to the evidence given as to division between Shaṇmuga and his brothers. The result of our

judgment is that the female plaintiff Sundaram and the female defendant Mánikka Ammál are entitled in equal shares to an amount sufficient to produce the monthly sum of ten rupees. 1863. *June* 30, *Aug.* 4 & 7. *O. S. No.* 94 *of* 1863.

NOTE.—Here follows the passage from Sir Thomas Munro's minute to which the Chief Justice refers in the judgment last reported.

"*In Consultation*, 15*th March* 1822.

"In 1783 Azím Khán, Díwán of the Nawáb Wallaja, obtained a jágír, which was confirmed to him by a parwána, dated 29th July 1789, "by way of an áltamghá ina'am" of the Kámil Jamma of 64,000 chakrams 11 ánás. The grant is in the usual form,—"to be enjoyed by him and his descendants for ever, from generation to generation." He is authorized to divide it amongst his descendants, and the local officers are required to consider the parwána "as a most positive peremptory mandate, and not to require a fresh sanad every year."

"The terms employed in such documents, "for ever," "from generation to generation," or in Hindú grants, "while the sun and moon endure"(*a*), are mere forms of expression, and are never supposed, either by the donor or the receiver, to convey the durability which they imply, or any beyond the will of the sovereign. The injunction with which they usually conclude.—"Let them not require a fresh sanad every year," indicates plainly enough the opinion, that such grants were not secure from revocation." Gleig's *Life of Sir Thomas Munro*, vol. II, p. 314-5.

Regarding the law of succession to the self-acquired property of an undivided brother see *Varaḍiperumál Uḍaiyan* v. *Ardanári Uḍaiyan*, infra p. 412, and the recent case in the Privy Council, *Kattama Nauchear* v. *The Rajah of Shivagunga*, 30th November 1863.

Appellate Jurisdiction (*b*)

Regular Appeal No. 20 *of* 1863.

KUMA'RADEVA MUDALI, and another.........*Appellants.*

NALLATAMBI REḌḌI, and others...............*Respondents.*

Lands held on the terms of an ordinary ryotwary settlement with annual paṭṭá and left waste by the paṭṭádár may be legally granted by the revenue authorities.

Special Appeals 55 and 69 of 1858, 101 and 482 of 1860 followed.

The ryot has an indefeasible right of occupation only so long as he pays the Government assessment.

THIS was a regular appeal from the decision of C. Collett, the Acting Civil Judge of Chittúr, in Original Suit No. 14 of 1861. This suit was brought to recover certain lands in the ryotwary district of North Arcot which were possessed and cultivated by the plaintiff's father up to about the year 1850, as an ordinary paṭṭádár. In 1850 and 1851 he voluntarily abandoned the lands, which were consequent- 1863. *August* 8. *R. A. No.* 20 *of* 1863.

(*a*) Compare Teutonic legal formulæ such as *also lang als diu sonne schînt*: *so lange der wind weht, der hahn kräht und der mond scheint*, cited in J. Grimm's *Deutsche Rechtsalterthümer*, 2te Ausg. s. 38.

(*b*) Present Phillips and Frere, J J.

1863. August 8. R. A. No. 20 of 1863.

ly left waste. In 1852 the lands were granted to the defendant. The Acting Civil Judge delivered a decree from which the following is an extract:

"Finding, then, the facts as above, the question of law arises whether, under these circumstances, the revenue authorities were justified in granting the lands to others and could and did thereby pass to and confer upon them an interest effective as against the plaintiffs. Now I confess that if this question were open to me for discussion, I should feel a great deal of doubt upon it; but I think that I am concluded by authority on this point. There appear to have been numerous decisions of the Madras Ṣadr Court on the subject, and it has invariably been held that where there has been only abandonment of or omission to cultivate lands held under paṭṭás, the revenue authorities are competent to grant the same to others and to issue paṭṭás to them, and by so doing will confer a title good against the former occupants. In support of this position I will refer to the printed reports of the Ṣadr Court for 1858, pages 43, 152 and 160, for 1860 page 235 and for 1861 page 112. There was also a decision to the same effect so late as February last. I do not anywhere find the grounds of the Court's judgment stated at length, but in one case, that in the reports for 1860 page 236, the authority of the collector is stated to rest on Regulation 2 of 1803, section 9 and Regulation 2 of 1806 section 4. Now, with great respect, I do not observe that those regulations give any such authority as supposed. Another ground on which the law has been placed is perhaps more satisfactory, namely, the rules of the district and established usage (Reports for 1861 page 113). But the case of *Freeman* v. *Fairlie* 1 Moore's I. A. C. 305 to 349, in which the nature of the interest conveyed by a paṭṭá was so elaborately discussed, does not appear to have been cited in any of the above cases. There is so much in *Freeman* v. *Fairlie* that appears to me entirely applicable to paṭṭás in the Madras as well as in the Bengal Presidency, that had I to decide the limit of the power of the revenue authorities to confer a good and indefeasible title under a paṭṭá whenever land has been left waste, I should have felt great difficulty in fixing the limit, and in saying whether the present case would fall within the limit. But I am quite satisfied that

I am concluded by the authority of the decisions I have cited of the Sadr Court, and according to those cases it seems to me quite clear that the revenue authorities were justified in 1851 and 1852, in granting the lands to the defendants, and that the paṭṭás conferred on them a good title as against the plaintiffs. It follows therefore that the case for the plaintiffs has entirely failed, and it must be dismissed. The costs with interest thereon at 12 per cent. will follow the result." 1863. *August* 8. *R. A. No.* 20 *of* 1863.

Norton for the appellants, the first and second plaintiffs, contended:

1. That the act of the revenue authorities conferred no valid or legal title against the appellants.

2. That there was no regulation or legislative enactment which justified or legalized the act of the revenue authorities complained of.

3. That neither a course of legal decisions nor a custom or usage opposed to the law of the land could prevail to deprive the appellants of their legal rights.

4. That the course of decisions observed on by the Civil Court, though binding on that Court, was no bar to this Court if such course of decision should appear manifestly wrong.

5. That the rights of the ryot paṭṭádár had been considered and decided by the Privy Council in favour of the appellants' contention. *Freeman* v. *Fairlie*(a).

Saḍagópáchárlu for the respondents, the fourteenth and twenty-fourth defendants.

The Court delivered the following

JUDGMENT:—This was a suit for the recovery of nañjey and puñjey lands in the district of North Arcot, said to be the property of the plaintiffs, which had been granted by the Collector to the defendants, and are now in their occupation.

The Acting Civil Judge observed that the lands in question were shown to have been formerly held for some years by the plaintiffs' father under the terms of an ordinary ryotwary settlement, with annual paṭṭá in his name from

(a) 1 Moo. I. A. C. 305.

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the Collector of the district; but that they were left waste in the years 1850 and 1851, and subsequently granted to the defendants by the same authority. In accordance therefore with judicial precedent as established by the decisions of the late Ṣadr Court in Special Appeals 55 and 69 of 1858 (pages 152 and 161 of the printed decisions for 1858), 101 of 1860 (page 235 of the printed decisions for that year), 482 of 1860 (page 112 of the printed decisions for 1861) and others, the Acting Civil Judge held that the lands on being abandoned and left waste by the plaintiffs' father, were at the disposal of the revenue authorities, and that they had been legally granted to the defendants, the present occupants. He accordingly dismissed the plaintiffs' suit with costs.

The plaintiffs in this case claim in effect to be proprietors in fee simple of the lands in question, which are situated in the ryotwary district of North Arcot, and are confessedly subject to an annual settlement. We are not aware that such a claim has been at any time allowed or sanctioned by judicial precedent with respect to lands of this description in the Madras Presidency, while on the other hand, as observed by the Acting Civil Judge, the contrary doctrine has been at all times followed both as respects revenue practice and the decisions of the Courts of Law. The ryot in such cases has it is true by immemorial custom and usage, an indefeasible right of occupation so long as he pays the fixed Government assessment on the lands; but on his abandoning the lands and ceasing to make this payment, it has been constantly held that the Government possess the power of granting them to other ryots for the purposes of cultivation. We are consequently of opinion that the plaintiffs' claim to recover the lands in question is untenable and must be disallowed. We therefore affirm the decision of the Acting Civil Judge, and dismiss the present appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 10 *of* 1863.

SUPPANA'CHA'RI and another...... ......*Appellants.*

CHAKKARA PATTAN and another........*Respondents.*

Where a judgment was passed against several defendants jointly and severally and some of them paid the whole of the judgment-debt :—*Held* that they might sue the others for contribution.

CASE referred for the decision of the High Court by R. B. Swinton, Judge of the Court of Small Causes at Tanjore. 1863. *August* 13. *R. C. No.* 10 *of* 1863.

No counsel were instructed.

The facts appear from the following

JUDGMENT :—The plaintiffs and two defendants were defendants in suit No. 579 of 1860 before the District Munsif of Combaconum. The decree was against the plaintiffs and defendants jointly and severally, and the whole of the judgment-debt having been paid by the present plaintiffs they have sued the defendants for contribution.

The question referred by the Judge of the Court of Small Causes at Tanjore, who has passed a provisional decree, is whether the action will lie?

There exists no doubt of the plaintiffs' right to the contribution sought. The plaintiffs and defendants being subject to a decree against them jointly, the whole of the amount was levied from the plaintiffs. This is exactly the case put by Lord Kenyon in *Merryweather* v. *Nixan(b).*

It is the case of one man having been compelled by process of law to pay money which another was legally compellable to pay; and the law in such cases presumes that it was paid at the request of that other*(c).*

The judgment delivered has our full concurrence.

(a) Present Phillips and Holloway, J J.

(b) 2 Smith L. C. 5th ed. 456 : 8 T. R. 186 S. C. " The distinction is clear between this case [of one tortfeasor attempting to recover contribution against another] and that of a joint judgment against several defendants in an action of assumpsit." See *Sadler* v. *Nixon*, 5 B. & Ad. 936, *Blackett* v. *Weir*, 5 B. & C, 387-8,

(c) 2 Smith L. C. 146.

Appellate Jurisdiction (a)

Special Appeal No. 374 *of* 1863.

VARADIPERUMA'L UDAIYAN.........*Appellant.*

A'RDANA'RI UDAIYAN and others.........*Respondents.*

By the law current in the Madras Presidency an undivided Hindú is entitled during his lifetime to the separate enjoyment of his self-acquired immoveable property; but on his death without male issue, such property, unless it has been previously disposed of, devolves on his surviving co-parceners, and his widow is only entitled to maintenance.

1863. *October* 29. *S. A. No.* 374 *of* 1863.

THIS was a special appeal from the decree of H. M. S. Græme, the Acting Civil Judge of Salem, in Appeal Suit No. 105 of 1862, dismissing an appeal from the decision of the Principal Ṣadr Amín of Salem in Original Suit No. 7 of 1858. This suit was brought to recover a moiety of the Saṇdamaṅgalam and Tálúr Muṭṭás and of certain nañjey and puñjey lands in the zila' Salem. The first defendant was a Hindú widow, and the plaintiff sued as the undivided cousins of her deceased husband. It was proved that the property was the self-acquisition of the deceased and that he died undivided and without male issue, and the only important question raised was whether his property went on his death to his widow or to his surviving co-parceners. The Principal Ṣadr Amín, citing Mr. Justice Strange's Manual of Hindú Law, sec. 319, held that the plaintiffs, as the surviving co-parceners of the deceased, must be regarded as his rightful heirs in whichever way the property left by him was acquired. The widow purported to adopt a son, who was made a supplemental defendant.

Tirumaláchári yár, for the appellant, the supplemental defendant, cited 2 Macnaghten's Hindú Law 32: 1 Sel. Dec. 100: *The Mitákshará*, i. sec. 4, §§ 1—6; but chiefly relied upon a vyavastha dated the 16th September 1845 of Bhímasenáchárlu and K. Gopála Çástrí, the then paṇḍits of the late Madras Ṣadr Court, of which the following is a translation:—

"If A, an undivided brother, who died leaving no male issue, as stated in the question, had—by his proficiency in Vedas or by service, or by his own ability, and without the use of his father's estate, or of the property common to himself and his brother—acquired the land alleged to have been

(a) Present Frere and Holloway, J J.

purchased by him as his "self-acquisition,"—such land, according to the law, appertained only to the acquirer; after his death, his widow alone, and not his surviving undivided brother, is entitled to succeed to it.

1863. October 29. S. A. No. 874 of 1863.

"If, on the other hand, A had acquired the said land, by the use of the paternal estate, or of the wealth jointly acquired by himself and his brother,—then, B, his undivided brother, alone would be entitled to succeed to the said land according to the Hindú law; the widow of A having right to receive only maintenance, and nothing more.

"*Authorities.*

"Yájñavalkya:—"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the coheirs. Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parceners: nor what has been gained by science." [Book II, çl. 118, 119].

"Manu:—"What a brother has acquired by his labour without using the patrimony, he need not give up to the coheirs; nor what has been gained by science." [Chap. IX. 208.]

"Vyása:—"What a man gains by his own ability, without relying on the patrimony, he shall not give up to the coheirs."

"Yájñavalkya:—"The wife and the daughters also, &c. &c."

"Kátyáyana:—"What belonged to the paternal grandfather, or to the father, and any thing else [appertaining to the coheirs, having been] acquired by themselves; must all be divided at a partition among heirs."

"The commentary of the above texts, as contained in the Hindú law-books Vijñaneçvareyam, Smritichandriká, &c., is also sufficient authority in the matter."

Mayne, for the respondents, the plaintiffs. None of the authorities cited apply, except the paṇḍits' vyavastha, and that is not supported by the authorities on which it professes to rest. The first passage from Yájñavalkya and those from Manu and Vyása simply mean that an undivided brother has during his life-time the right to enjoy separately such property as he himself may have acquired, but after

1863. October 29. S. A. No. 374 of 1863.

his death, if he leave no male issue, and if he have not alienated, it will belong to the surviving co-parceners, [HOLLOWAY, J.:—That certainly appears to be the law.] The other quotations have nothing to do with the question(a). A childless widow inherits, according to the Mitákshará, only when her husband has died separated: 1 Sir Thomas Strange's *Hindú Law*, 121: Strange's *Manual*, 2d ed. § 377.

Tirumaláchâriyár replied.

FRERE, J.:—This appeal must be dismissed. The authority of the vyavastha is nothing as compared with that of the concurrent opinions of Sir Thomas and Mr. Justice Strange.

HOLLOWAY, J.:—I have always understood that in this Presidency at least the law was clearly that the immoveable property of an undivided member of a Hindú family may go to his surviving co-parceners, whether such property was self-acquired or ancestral. During his life he is entitled to the separate enjoyment of his self-acquired immoveable property, with the right, if he have no male issue, to alienate the same. On his death without male issue such property, if not previoulsy alienated, devolves on his co-parceners. But his widow, whether childless or not, has no title to any thing but maintenance. The propositions laid down by the appellant's vakíl come within Lord Denman's category of law taken for granted. The Mitákshará has, no doubt, like all Hindú law-books, the advantage of containing statements of the most discordant character; but it is clear that its author was of Dhareçvara's opinion (*Mitáksh.* II, i. 8): "The rule deduced from the texts that the wife shall take the estate regards the widow of a separated brother." And it may be reasonably inferred that an author who lays down that a widow inherits when her husband was divided was also of opinion that she would not inherit when the deceased was undivided.

The appeal is dismissed with costs.

Appeal dismissed.

(a) But see Manu (?) cited 2 Strange's *Hindú Law* 250, from a copy of a paper in the hand-writing of Sir Wm. Jones: "If the husband has been a coheir and died before partition, his brother and the next order inherit his undivided share but his wife takes all his divided property": and the opinion of Kistnamâchâryar, a Mofussil pandit, cited Ib. 231.

The judgment of the Lords of the Judicial Committee of the Privy Council in *Kattama Nauchear* v. *The Rajah of Shivagunga*, delivered 30th November 1863 principally rests on the passage last cited, which the Reporter has been unable to find in Manu or elsewhere.

Appellate Jurisdiction (a)

Special Appeal No. 111 *of* 1863.

PURAPPAVANALIṄGAM CHEṬṬI.........*Appellant.*
NULLASIVAN CHEṬṬI and others...*Respondents.*

By Hindú law the eldest male heir of a deceased trustee succeeds as trustee him from whom he inherits.

Special Appeal No. 130 *of* 1860 observed upon.

PER HOLLOWAY, J.:—The Court will not be deterred from making a decree by the difficulties to be expected in carrying it out.

1863. October 31. S. A. No. 111 of 1863.

THIS was a special appeal from the decision of Kristnasámi Ayyar, the Principal Ṣadr Amín of Tinnevelly, in Appeal Suits Nos. 194 and 212 of 1862. This decision was as follows :

"The plaintiff, alleging that certain lands had been granted by his grand-father for the benefit of a Pullaiyár Kóvil called "Karpaga Vináyakasvámi," brought this suit to recover management of the above lands from his uncle the first defendant, with arrears of profits amounting to rupees 331-4-11, or to permit him to manage the above endowment jointly with the defendant.

"The Principal Ṣadr Amín considers that the above claim of the plaintiff is opposed to the principle enunciated in the decree of the Court of Ṣadr 'Adálat in *Special Appeal No.* 130 *of* 1860, wherein they have clearly pointed out the impracticability of the management of an endowment by rival parties, and ruled that both the possession and the management of a property endowed for religious purposes should remain in the same hands.

"According to the admission of the plaintiff's own vakíl before the appellate court, the defendant is the senior member of the family for the time being, and the endowment claimed is indivisible under the Hindú law, it being granted for a religious purpose.

"The Principal Ṣadr Amín therefore considers that the plaintiff has no right to dispossess the defendant of the property in dispute or to claim a right to the joint management thereof.

(a) Present Frere and Holloway, J J.

1863. October 31. S. A. No. 111 of 1863.

"The original decree is accordingly reversed, and the plaintiff's claim dismissed *in toto* with costs."

Rajagópáláchári, for the appellant, the plaintiff.

Tirumaláchániyár, for the respondent, the first defendant.

FRERE, J. :—This was a suit to recover joint possession of five koṭṭas, seventeen markals and five and half measures of seed lands, said to be attached to the temple at Bramadesam in the District of Tinnevelly, on the ground that the plaintiff's father and the first defendant had held the property as joint trustees for a long series of years; that the plaintiff's father died in 1859; and that subsequently the first defendant had refused to allow to the plaintiff as the heir and representative of his deceased father, a share in the management.

The first defendant resisted the claim, affirming that he had himself held exclusive possession of the lands in question for a period of twenty-two years.

The District Munsif of Bramadesam passed judgment in favour of the plaintiff's claim, as respects five koṭṭas fourteen markals, and one measure of the land in dispute, and adjudged the plaintiff to be entitled to joint possession of these lands; but disallowed his claim to the remaining three markals and four and half measures, on the ground that they were shown to be the private property of the first defendant.

Both parties appealed against this decision, and the Principal Ṣadr Amín dismissed the plaintiff's claim *in toto*, being of opinion that under the rule enunciated in the decree of the late Ṣadr Court in *Special Appeal No.* 130 *of* 1860*(a)*, an action would not lie in the case stated by the plaintiff.

I am of opinion that the Principal Ṣadr Amín has in this case misapplied the precedent to which he alludes in paragraph 2 of his decree. The judgment in that case proceeds in a great measure on the ground that it was impossible to divide the management of property into fractional parts in favour of a party whose right to the possession of such property, or any part of it, was wholly disallowed. In the pre-

(a) M. S. D. 160, page 261.

sent case the plaintiff sues simply to be placed in joint management in succession to his father, who is said to have exercised rights of the same description, conjointly with his brother the first defendant.

The Principal Ṣadr Amín has now decided that the plaintiff's father and the first defendant jointly managed the property during the life-time of the former. It is clear therefore that the judgment of the Principal Ṣadr Amín should be reversed, and that the plaintiff should be declared entitled to joint management of the temple property.

The first defendant should in my opinion be charged with the costs of suit throughout.

Holloway, J.:—I give no opinion upon the question whether there is any solid distinction between this case and that quoted by the Principal Ṣadr Amín. It is found as a fact that the deceased father of the plaintiff and the first defendant his brother were joint trustees of this pagoda. The custom of the country so far as I know universally recognizes the right of the eldest male heir of a deceased trustee to succeed as trustee him from whom he inherits. It has not been attempted at the bar to deny that this is the law. If it is a question of special usage then the fact that first defendant was a trustee while his elder brother was alive proves its existence in this case.

It was attempted in this case to deter the court from making the necessary decree from the difficulties to be expected in carrying it out. The answer to this is that given by Lord Brougham. "The Court will try"(a). The decree should declare that the plaintiff is joint trustee with the first defendant of this pagoda.

The appeal is allowed with costs payable by the first defendant.

(a) Docker v. Simes. My. and K. 655.

Appellate Jurisdiction (a)

Regular Appeal No. 17 *of* 1863.

VEṄKAṬA REḌḌI..............................*Appellant.*
VEṄKAṬARA'MAIYA and another.........*Respondents.*

Regular Appeal No. 21 *of* 1863.

CHINNAMALLAIYA and another............*Appellants.*
VEṄKAṬARA'MAIYA and others............*Respondents.*

The appellate Court will not enter into the details of the account of a Commissioner appointed under Section 181 of the Code of Civil Procedure.

Regular Appeal No. 54 *of* 1861, (supra p. 1) concurred in.

A party cannot be heard in the appellate Court upon items to which he took no objection in the Court below.

But where there has been error in the principle upon which such account has been taken the appellate Court will correct such error if excepted to in the Court below.

1863. *October* 31. *RR. AA. Nos.* 17 *&* 21 *of* 1863.

THESE were regular appeals from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 2 of 1861.

Raṅgaiya Náyuḍu for the appellants, the 4th defendant in Regular Appeal No. 17 of 1863.

Tirumaláchári̇yár for the appellants, the 1st and 2nd defendants in Regular Appeal No. 21 of 1863.

The facts appear from the following

JUDGMENT:—The original suit was brought for an account of the dealings of a dissolved partnership, and for the money to be found due upon such account.

The matter was most properly referred to a Commissioner who, after a lengthened investigation, presented his report, to which exceptions were taken by the parties, fully discussed before the Civil Judge and determined by him.

We quite concur with the doctrine in Appeal No. 54 of 1861(*b*) that an appellate Court ought not to enter into the details of an account of a Commissioner appointed under Section 181 of the Code of Civil Procedure. To do so would be to defeat all the benefit of the enactment and at-

(*a*) Present Frere and Holloway, J J.

(*b*) Supra p. 1.

1863. October 31. BR. AA. Nos. 17 and 21 of 1863.

tempt to do what no Court can satisfactorily do,—decide an interminable series of questions upon all the items of such an account.

It is still clearer that a party cannot be heard here upon items to which he took no exception in the Court below.

This is fatal to the appellant in No. 17 of 1861, because no one of the objections now taken was made by him in the Court below.

Where there has been error in the principle upon which the account has been taken, the Court will however correct such error, if excepted to the Court below. After an elaborate discussion of the items in the account by the vakíl for the appellant in No. 21 of 1862, we are able to discover only one item in which such error of principle is observable. This is item 8 in which no credit was given to the other members of the partnership for 170 boxes of thread sold to one K. Sadásimiḍu. It is quite clear that this debt should have formed a part of the account. It is a debt to the partnership, and as there appears to have been no allegation that the debt is a bad one, credit ought to be given to the defendants for their shares of this debt. With this modification the decree of the lower Court appears to us in all respects right and these appeals must be dismissed with costs.

Appeals dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 139 *of* 1863.

NARASAMMA'L..............................*Appellant.*
BALARA'MA'CHA'RLU.................*Respondent.*

A custom which has never been judicially recognised cannot be permitted to prevail against distinct authority.

The theory of an adoption is a complete change of paternity: the son is to be considered as one actually begotten by the adoptive father, and he is so in all respects save an incapacity to contract marriages in the family from which he was taken.

In the Andhra country, as in Bengal, a Bráhman cannot adopt his sister's son.

1863. *October* 31. *S. A. No.* 139 *of* 1863.

THIS was a special appeal from the decision of T. J. Knox, Civil Judge of Chicacole, in Special Appeal No. 118 of 1860, affirming the decree of C. R. Pelly, Judge of the Subordinate Court of Chicacole, holden at Vizagapatam, Original Suit No. 112 of 1859. This suit was brought by the appellant, a Hindú widow, to obtain a house and land belonging to her deceased husband. The defendant Venkaṭammál as mother and guardian of the respondent a minor, contended that he was entitled as having been adopted by the deceased. The plaintiff replied that such adoption was void, the minor being the son of a sister of the deceased. The Subordinate Judge, however, dismissed the suit; and, on appeal, the Civil Judge affirmed his decision in the following judgment:—

"Plaintiff sued to obtain possession of her deceased husband's property, denying that her husband either did adopt a son or could have adopted his own sister's son.

"The defendant on behalf of the minor answered that the adoption was made and was valid.

"The lower court was of opinion that two points were at stake; one of fact, whether the adoption was made, and one of law, whether it was or was not invalid according to Hindú law.

"The lower court was of opinion that the evidence as to the fact of adoption was conclusive, and that the necessary ceremony to constitute a valid adoption had been performed.

(a) Present Frere and Holloway, J J.

"Regarding the legality of this adoption, the court observed that the paṇḍits of the Ṣadr Court differed in their opinion; one said that among Bráhmans, a sister's son could not be adopted, while the other said that in the Dráviḍa country the adoption of a sister's son is both sanctioned by law and recognized by custom, and this paṇḍit, being the senior paṇḍit, affirmed that the text quoted by the junior paṇḍit did not apply to the Dráviḍa country.

"The lower court after a reference to Strange's *Hindú Law*, and Sutherland on *Adoption* was of opinion that the junior paṇḍit's opinion rested on a single text, not pointedly prohibitory, and that the adoption of a sister's son in this case must be upheld and decreed against plaintiff's claim.

"Plaintiff appealed, because the fact of the adoption was not proved, and the dying state her husband was in afforded strong presumption, he had not strength to go through the long ceremony necessary to render an adoption valid; because the law applicable to the Dráviḍa country is not in force in Vizagapatam district, which lies in the Andhra country, and plaintiff refers to various authorities in support of his opinion.

"The Civil Judge agrees with the lower court that the evidence is conclusive; that a sister's son was duly adopted, and as this boy had lived always with his adopting father, it was a very natural and very proper act.

"The important question is, according to Hindú law, is it a valid adoption?

"It is found that the paṇḍits of the Ṣadr Court have given different opinions, one paṇḍit declaring that among Bráhmans, a sister's son cannot be adopted, and the other, that custom sanctions the practice in the Dráviḍa country.

"Strange's *Hindú Law* in section 91 says, emergency will justify this adoption among *all* classes; in section 92 that custom sanctions it in South India, or the Dráviḍa country even without emergency, and from section 94 the Civil Judge concludes that such usage, that is, such a practice where no emergency exists, does not prevail in the northern part of the Presidency, and from section 97 it is clear that among all castes emergency will render valid such an adoption; the question then remains for the court to decide

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whether in this instance, emergency, that is circumstances arising above the ordinary course of things, justified the deceased husband in the course he took.

"The object of adoption is to secure the fullest and most meritorious performances of the funeral obsequies of the adopter; those celebrated by a son being in some spiritual sense more efficacious than by any other heir, and in this instance no doubt the adopter's second object was to confer a right of inheritance to considerable property on a sister's son, who since childhood had lived in his house, and for whom evidently his wife entertained no affection, the adopter was at the time in a critical position, and on his death-bed when this act was done, and as far as this record goes, he had no near male heirs, and it is evident he could not trust his widow to adopt this boy after his decease.

"He had by Hindú law power in his life-time to alienate his property to the exclusion of his widow, provided she had maintenance.

"As to the rules current in the Drávida country not applying to these parts, the Civil Judge is of opinion, that the parties who allege this are bound to show to what school of law they would refer. The vakíl states that this is the Andhra country, and so it may be called in antiquated maps framed 300 years ago, but the name in the map does not show that it has any separate law applicable and peculiar to itself; on the contrary, be its name what it may, it must be regulated by one of the five great law-schools, and if the Madras law will not apply, the Bengal school, to which alone the so-called Andhra country could belong, would at once decide the matter on its principle, that a fact cannot be altered by a thousand texts: this alienation of property, though prohibited by law, would nevertheless when actually effected be left undisturbed; and no doubt the great principle that what ought not to have taken place once done is valid is often applied in cases of Hindú law in Southern India.

"The Civil Judge is of opinion that plaintiff as widow is not in a position to destroy the validity of her husband's act; it was rendered emergent both by his approaching death and her want of a son, and her dislike to the boy

her husband wished for; and if she has a sufficient maintenance, the Civil Judge is of opinion that the adopted son's claim as heir is superior to her indefinite position as a childless widow; it is the duty of the civil court to support the evident and just intentions of parties, and advance substantial justice; the deceased may have erred in adopting his sister's son and injured himself, but he has done plaintiff no wrong, for she had no certain right of inheritance to property which her husband at any time during his life-time could alienate, and in fact did so.

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"The decree of the lower court is confirmed and appeal dismissed with costs."

Srínivásácháriyár, for the special appellant, the plaintiff. The person to be adopted by a Bráhman must be one whose mother the adopter could legally marry, Sutherland *Synopsis* p. 223.

Mayne, for the special respondent, the second defendant relied on Strange's *Manual* 2d ed. p. 22: "Çúdras......may adopt daughter's or sister's sons.

"87. All classes may make such adoption in emergency (Pro. of Ṣadr Court 4th and 25th June 1836.)

"88. The custom of making such adoption, even without emergency, prevails in the Presidency of Madras (Pro. of Ṣadr Court, 4th and 25th June 1836.)

"89. This usage is upheld by the Vyavahára Mayúkha (Ṣadr Paṇḍits 25th Feb. 1839) and the Vaidyanátha Dikshitíyam (Senior Ṣadr Paṇḍit 16th May 1855.)

The judgment of the Court was delivered by

HOLLOWAY, J.:—This was a suit brought by the widow of a deceased Bráhman to recover from the person alleging himself to be his adopted son the property left by that Bráhman.

The defence was that the defendant, son of the sister of the deceased, was legally adopted by him.

Both the lower Courts have found that a ceremony took place which, if the boy could be legally adopted, would constitute him an adopted son; and this finding is, in point of law, impugned upon this appeal upon the ground of the absence of the father, who had, however, expressed his assent

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The lower Courts have followed an opinion of the late Mr. Ellis (2 Strange's *Hindú Law*,101.) "In practice, the adoption of a sister's son by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions." On this opinion and that of the senior paṇḍit of the late Ṣadr Court that in the Drávida country the prohibition was not binding, the judgment of the lower Court has gone.

It is admitted on both sides that there is no judicial authority upon the subject, so that the case is one of first impression and must be decided upon the principles of Hindú law, unless it be shown that in the country of the parties that law has been modified by customs which have received judicial recognition. A very short experience will suffice to satisfy any judge that a paṇḍit will always overcome a passage of Hindú law too stubborn for other manipulation by the often baseless allegation of custom; and in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority.

Now the passage quoted at page 101 distinctly forbids the adoption of a sister's son by one of the three higher classes, and the weight of the prohibition is increased by the addition of the doctrine that the sister's son may be adopted by a Çúdra. Mr. Sutherland, the greatest English authority on the subject (P. 223,) lays it down as a fundamental principle that the person to be adopted must be one with the mother of whom the adopter could legally have intermarried.

Nanda Paṇḍita lays it down in distinct terms that the daughter's son is not such a reflection of a son as can legally be taken in adoption, and the commentator, *Dattaka Chandriká* section II par. 8, defines the reflection of a son, as "the capability to be begotten by the adopter through appointment, and so forth." It is manifest that the sister's son is not such an one: section V par. 18 of the *Dattaka Mímánsá*: "For the three superior tribes a sister's son is nowhere [mentioned] as a son," and again, "prohibited connexion is the unfitness [of the son proposed to be adopted] to have been begotten by the individual himself through ap-

pointment [to raise issue on the wife of another]." There exist, therefore, the very highest opinions in favour of the illegality of such an adoption, and to these is to be opposed the extrajudicial opinion of a gentleman, doubtless of great eminence, but still a mere opinion.

Mr. Justice Strange in the second edition of his *Manual* lays it down "that usage has sanctioned the departure from the rule to the extent that there (the Madras Presidency) a daughter's or a sister's son may be adopted." In the former edition at page 17 section 92, it was said, on the authority of extrajudicial proceedings of the Ṣadr Court, to prevail as an usage in South India, that is, the Drávida country, and in section 94, quoting the opinion of a paṇḍit of the Provincial Court of the northern division, it was stated that the usage did not prevail there. This passage has been altogether omitted in the later edition, perhaps on the authority of the opinion given by the senior paṇḍit in this very case. The Civil Judge was shown by an old map that the country in which he was administering this supposed custom was not the Drávida country; and there seems to us no doubt whatever that this is the case, and that the opinion of a paṇḍit of the northern division, as to the non-existence of the custom there, was certainly of much greater weight than a vague statement such as that contained in the opinion of the Ṣadr paṇḍit. Drávida is the Tamiḻ country and Andhra is the name for Telingana: it is true that the family of languages spoken in this Presidency is called the Drávidian family, but this does not affect the meaning of geographical terms.

It is to be observed, too, that Mr. Ellis, a Sanskrit scholar, was himself not a Telugu scholar, although profoundly versed in the Tamiḻ language and customs.

This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority, against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of justice bound to administer the law. More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself a logical deduction from the very nature of the subject to which it applies. The whole theory of an adoption is the complete change of paternity.

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For the purposes of this argument, the son is to be considered as one actually begotten by the adoptive father. He is so in all respects, save an incapacity to contract marriage in the family from which he was taken(a). It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman law. Item amitam, licet adoptivam, ducere uxorem non licet(b).

We are unable therefore to agree that the text is not pointedly prohibitory; and even if there had been no such text, we are of opinion that as being a logical consequence of the very nature of an adoption, the Court would be bound to decide that such an adoption is invalid. The Civil Judge is not very correct in the basis of the dilemma in which he has placed the widow. He says that if not governed by the school which prevails here, he must be governed by the Bengal school which would validate any act done; and the unmeaning words, "a fact cannot be altered by a thousand texts," are supposed to embody a principle which would govern the case. It is clear, however, that by the Bengal school of law, this transaction would as an adoption be absolutely void.

In treating this adoption as an alienation we further think the Civil Judge wholly unfounded. It is true that a philosophical jurist of our own time, has told us that an adoption is in Hindú society a substitute for the Will, which is purely of Roman invention(c); but to alter the disposition of property made by the law, there must be an adoption. This is not one. The result, therefore, is the same as it would be if a man capable of disposing of property by will, had executed a document, which from some defect was not a will. It could by no possibility be argued that the intent to alienate being clear the attempting testator had actually alienated.

We are clearly of opinion that the decree of the lower Court should be reversed and a decree be given for the plaintiff; but that there should be no costs on either side.

Appeal allowed.

(a) And to adopt his own natural brother, *S. A. No.* 27 *of* 1858 M. S. D. 1858, p. 117.

(b) Inst. Lib. I Tit. X 5. The natural son was always *cognatus* to his own blood relations, although by emancipation or adoption, he might cease to be *agnatus* to them. Sandar's Inst. 127.

(c) Maine's *Ancient Law*, 193.

NOTE.—For the illegality of a Bráhman's adoption of his sister's son in Bengal see *Doe* v. *Kora Shunker Takoor* v. *Bebee Munnee*, East's Notes, Case 20, 1 Morl. Dig. 18, and that a sister's son cannot be adopted in the N. W. Provinces, see *Luchmeenauth Rao Naik Kaleyah* v. *Mt. Bhina Baee*, 7 N. W. P. 441, 443. The reason given is that it imports incest. So a Bráhman widow cannot adopt her uncle's son, as she could not be his mother unincestuously, *Dugumbaree Dabee* v. *Taramoney Dabee*, Macn. Cons. H. L. 170. In Madras it has been held that there can be no adoption where there is such blood relationship between the adopter and adopted son's mother as would have prohibited marriage with her in her maiden state. *SS. AA. Nos.* 14 *&* 15 *of* 1857 M. S. D. 1857. pp. 94, 96. 1863. *October* 31. *S. A. No.* 139 *of* 1863.

Appellate Jurisdiction (a)

Regular Appeal No. 30 *of* 1863.

ISMA'I'L SA'HIB........................*Appellant.*

A'RUMUGA CHETTI and another.....*Respondents.*

Where a plaint is returned for amendment under sec. 29 of the Code of Civil Procedure, the order of return should specify a time for such amendment.

Where the plaintiff within three years from the arising of the cause of action presented his plaint, which was returned to him for amendment but without specifying a time for such amendment, and the plaint was reproduced and filed some days beyond the three years, and the defendants pleaded the statute of limitation:—*Held* that the date of commencing the action was that of the original presentation of the plaint.

THIS was a regular appeal from the decree of W. T. Blair, the Acting Civil Judge of Chittúr, in Original Suit No. 3 of 1862. 1863. *November* 7. *R. A. No.* 30 *of* 1863.

Ismá'íl Sáhib, the appellant, appeared in person.

Rangáyya Náyuḍu, for the first respondent.

The facts sufficiently appear from the following

JUDGMENT:—In this case the plaintiff within three years from the arising of the cause of action presented his plaint, which was returned to him for amendment, but without the assignment of any specified period for such amendment.

It was reproduced and filed by the late Acting Civil Judge, but some days beyond the period of three years from the arising of the cause of action.

The defendants pleaded the statute, and the successor of the Judge who filed the plaint, dismissed it as barred by the statute.

(a) Present Phillips and Holloway, J J.

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The plaint must have been returned for amendment under section 29(a) of the Code of Civil Procedure, and it would have been better for the order of return to have granted a specified time for amendment, as required by the rule of practice of the late Ṣadr Court.

As the matter now stands the real question is, whether the date of bringing the action was the date of the original presentation of the plaint, or that of its return amended.

It was open to the Court to have rejected the plaint, and if that course had been taken, no question could have arisen; but we think that the return of the plaint for amendment was obviously treating it as an existing plaint, and that upon its reproduction, amended, and above all upon its being received by the Court, the date of its original production must be treated as that upon which the action was really commenced. Supposing that, from defective scrutiny, the filing of the plaint had been originally permitted, permission to remedy what must have been merely formal defects, could not properly have been refused in the course of the trial.

We are unable to concur with the argument that the order of return for amendment must be read as if it had contained the words " you must produce it, within the two days still remaining of the three years from the arising of the cause of action." On the contrary we are of opinion that it must be read as if it had said " you shall have a reasonable time for amendment," and it does not appear that more than a reasonable time was occupied in amending.

We reverse the decision of the Acting Civil Judge upon this preliminary point and enjoin him to replace the suit upon his file and dispose of it upon its merits.

Appeal allowed.

(a) This section enacts that " if the plaint do not contain the several particulars hereinbefore required to be specified therein, or if it contain particulars other than those required to be specified whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified as hereinbefore required, the Court may reject the plaint, or at its discretion may allow the plaint to be amended."

Original Jurisdiction.

LONGBOTTOM *against* SATOOR and others.

A testatrix bequeathed the interest of a Government Promissory Note to "The Calcutta Armenian Orphans' College Funds for the relief and enjoyment of the poor families, widows, orphans and schools of the Armenian nation," to be received half-yearly by the wardens of the funds for the time being. Although there was a charity in Madras called "the Armenian Orphans' College", there was none in Calcutta or elsewhere answering the description of the Calcutta Armenian Orphans' College, but there were two and only two charitable institutions in Calcutta, which provided for the relief and enjoyment of the poor families, widows, orphans and schools of the Armenian nation. Of these one, the Church of St. Nazareth, distributed money amongst and gave relief to the poor families, widows and orphans of Armenian community, and the other, the Armenian Philanthropic Academy, educated gratuitously the poor and orphans of the same community. The note was invested by order of the Court, and there had been a large accumulation of interest thereon. The governors of the two institutions concurred in asking that each should receive a moiety of the accrued and future interest of the fund:—*Held* that the cyprès doctrine applied: that the accumulated interest should remain invested; but that the accruing interest on the accumulated fund should be paid half-yearly, one moiety to the wardens of St. Nazareth's Church and the other to the managers of the Armenian Philanthropic Academy.

STOKES moved before Bittleston, J., in chambers, on behalf of Carrapiet Arratoon Vertannes, Arratoon Manatsacan Vardon, Johannes George Bagram and Seth Arratoon Apcar, all of Calcutta, for an order according to the prayer of their petition, filed in this cause on the 28th February 1863. The petition, which was supported by affidavits, stated as follows: 1863 Oct. 28, Nov. 7.

By her will, dated the 25th day of January 1832, Coromseema Eleazar Lambruggen, late of Negapatam, deceased, the widow of Robert Henry Lambruggen deceased, bequeathed to "*the Calcutta Armenian Orphans' College Funds for the relief and enjoyment of the poor families, widows, orphans and schools of the Armenian nation*" the sum of 10,500 sicca rupees in a Promissory Note of the new 4 per cent loan No. 21 of 1832-33, dated 1st May 1832, the interest of which alone to be received half-yearly by the wardens of the said funds for the time being and applied to the purposes therein specified.

The testatrix appointed the Armenian Orphans' College at Madras (which she called "the Madras Armenian Orphans' College Funds") her residuary legatees, and died on the 21st day of May 1833 without having revoked or altered her said bequest. The will was proved in the same year.

On the 5th day of March 1834, the bill in the cause abovementioned was filed in the late Supreme Court of Judi-

1863. Oct. 28. Nov. 7. cature at Madras, by two of the executors in the said will mentioned, for the administration of the estate of the testatrix.

By the decree dated the 28th day of July 1835, made by the Supreme Court in the cause above mentioned it was ordered that the Sub-Treasurer of Fort Saint George at Madras with the privity of the Accountant General of the Supreme Court should carry to the credit of the cause, to an account to be entitled "*The legacy to the Calcutta Armenian Orphans' College Funds*", the said Government Promissory Note together with the sum of Madras rupees 871-1-4, being the amount of interest on the Promissory Note applicable to the purposes of the said charity, and that the same, together with all interest from time to time accruing on all the funds standing to the credit of the last mentioned account, should be invested for the purpose of accumulation subject to and until the further order of the Court.

In pursuance of the decree the Promissory Note, together with the sum of Madras rupees 871-1-4, was carried to the account aforesaid, and the interest from time to time accruing on the same funds has been duly invested for the purpose of accumulation.

The funds now standing to the credit of the said cause to the account aforesaid amount to the sum of rupees 36,311-14-7, consisting of the sum of rupees 35,199-8-0 in Government Promissory Notes or securities of the Government of India and the sum of rupees 1,112-6-7 in cash.

There is not now and never has been any charity answering the description of "The Calcutta Armenian Orphans' College Funds."

There *are* at Calcutta in the East Indies *two* charitable institutions only which provide for the relief and enjoyment of the poor families, widows, orphans and schools of the Armenian nation, namely, the Armenian Church called "St. Nazareth's Church," which distributes money amongst and gives relief to the poor families, widows and orphans of the Armenian Community, and "the Armenian Philanthropic Academy," which educates gratuitously the poor and orphans of the same community.

The petitioners submitted that under the circumstances hereinbefore appearing the said charitable legacy given by the will of the testatrix ought to be applied to charitable purposes having regard as near as might be to the objects intended by her by the said specific bequest to the Calcutta Armenian Orphans' College Funds, and that St. Nazareth's Church was entitled to a moiety of the funds representing the said legacy, and that the Armenian Philanthropic Academy was entitled to the other moiety.

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The petitioner Carrapiet Arratoon Vertannes was the warden of Saint Nazareth's Church and as such warden entitled to receive and give discharges for all legacies to the same church and the petitioners A. M. V. Johannes, G. Bagram and S. Arratoon Apcar were the managers of the Armenian Philanthropic Academy and as such managers entitled to receive and give discharges for all legacies to the same Academy.

The prayer of the petition was that if the Court should be of opinion that the charitable legacy given by the testatrix's will to the Calcutta Armenian Orphans' College Funds ought to be applied to charitable purposes having regard as nearly as might be to the objects intended by the testatrix by the said bequest, the Secretary and Treasurer of the Bank of Madras with the privity of the Accountant General might be ordered to pay to the petitioner Carrapiet Arratoon Vertannes as warden of the church of Saint Nazareth, or to his attorney or attornies in that behalf, one moiety of such part or parts of the funds now standing to the credit of the said cause to the account aforesaid as represented the said sum of Madras rupees 871-1-4, and the interest on the Promissory Note for sicca rupees 10,500, to be applied by Carrapiet Arratoon Vertannes for the sustenance and relief of the orphans of the Armenian community at Calcutta, and that the Secretary and Treasurer of the Bank of Madras with the privity of the Accountant General might be ordered to pay to the petitioners Arratoon Manatsacan Vardon, Johannes George Bagram and Seth Arratoon Apcar, as the managers of the Armenian Philanthropic Academy, or their attorney or attornies in that behalf, the other moiety of such part

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or parts of the same funds as last aforesaid, to be applied by them the said Arratoon Manatsacan Vardon, Johannes George Bagram and Seth Arratoon Apcar, for the education of the orphans of the Armenian community at Calcutta; and that the Secretary and Treasurer of the Bank of Madras with the privity of the Accountant General might be ordered to pay to the petitioner Carrapiet Arratoon Vertannes, or other the warden or wardens for the time being of St. Nazareth's Church, or his or their attorney or attornies in that behalf, one moiety of the interest from time to time to accrue due on the promissory note to be by him or them applied for the sustenance and relief of the orphans of the Armenian community at Calcutta, and that the said Secretary and Treasurer of the Bank of Madras with the like privity of the Accountant General might be ordered to pay to the petitioners Arratoon Manatsacan Vardon, Johannes George Bagram and Seth Arratoon Apcar or other the managers or manager for the time being of the Armenian Philanthropic Academy, or their or his attorney or attornies in that behalf, the other moiety of the interest from time to time to accrue due on the promissory note, to be by the said Arratoon Manatsacan Vardon, Johannes George Bagram and Seth Arratoon Apcar, or other the manager or managers for the time being of the Armenian Philanthropic Academy, applied for the education of the orphans of the Armenian community at Calcutta.

There had been a previous application in court, on the 13th March 1863, before the Chief Justice and Bittleston, J., which stood over in order that further affidavits might be obtained from Calcutta.

Stokes now submitted that the testatrix had a general charitable intention in favour of the poor families, widows, orphans and schools of the Armenians of Calcutta, which intention the Court was bound to effectuate. The Court will act on the doctrine of *cy-près*: *Moggridge* v. *Thackwell*(a), *Loscombe* v. *Wintringham*(b). The present case is almost on all fours with *Bennett* v. *Hayter*(c).

(a) 7 Ves. 69. (b) 13 Beav. 87.

(c) 2 Beav. 81.

The Acting Advocate General (Norton) for the Crown, supported *Stokes'* application, but suggested that some steps should be taken to secure the fund, as the petitioners were not within the jurisdiction. There should at all events be an enquiry as to the proportions in which the Church of St. Nazareth and the Philanthropic Academy should be allowed to share the interest of the fund. 1863. Oct. 28, Nov. 7.

Mayne, for the residuary legatees, the Armenian Orphans' College at Madras. In *Bennett* v. *Hayter* the testator bequeathed 1000*l.* to " the Jews' poor, Mile End :" there were two charitable institutions for poor Jews at Mile End, and there being no evidence to shew which was meant, the bequest was divided between them. There the testator had clearly a general charitable intention in favour of the poor Jews at Mile End. Here the testatrix had a special intention to benefit one particular institution corresponding exactly with " the Armenian Orphans' College" at Madras. Such institution does not exist in Calcutta: neither of the two petitioning institutions answers in name or intention that described, and therefore the bequest fails and falls into the residue. At all events there should be a reference to enquire into the existence elsewhere than in Calcutta of such an institution as the will describes.

Stokes, in reply. The corpus of the fund is safe, we only ask for the interest. As to the shares in the interest, there are only two institutions in Calcutta, which answer the charitable purposes of the testatrix, and there is no reason why the shares should be unequal. Moreover the governors of the two institutions concur in the prayer that each should have a moiety. The reference suggested by Mr. Mayne would be useless. The will was proved in 1833 and no one has since applied on behalf of such an institution as the will describes. Besides inasmuch as by the " Madras Armenian Orphans' College," the testatrix admittedly meant the Armenian Orphans' College at Madras, so by the " Calcutta Armenian Orphans' College" she must be taken to have meant the Armenian Orphans' College at Calcutta, the existence of which institution is expressly negatived by the affidavits.

BITTLESTON, J.:—As the case was first brought on before the Chief Justice and myself, I will mention it to him before I deliver judgment.

1863. Oct. 28, Nov. 7. On the 7th November the following judgment was delivered by

BITTLESTON, J.:—It seems to me clearly that the testatrix in the bequest in question had a general charitable intention in favour of the poor families, widows, orphans and schools of the Armenian nation *at Calcutta*, and not a special intention to benefit any particular institution. Doubtless she desired that if there was in Calcutta any such institution as an Armenian Orphans' College, (which does appear to be the name of a charitable institution in Madras, mentioned in the will), the Governors of that institution should be the instruments for the application of the fund; but it appears that there is no institution in Calcutta so named, and in that respect therefore the bequest cannot be carried out.

The Court, however, is bound to give effect to the general charitable intention of the testatrix as nearly as it can, and the affidavits, upon which the present application is made, disclose that there are in Calcutta two institutions and only two, viz., the Armenian Philanthropic Academy and the Armenian Church of St. Nazareth, which do closely answer the charitable purposes contemplated by the testatrix—the funds of the church of St. Nazareth being exclusively appropriated to the relief of the poor families, widows and orphans of the Armenian nation resident in Calcutta; and the funds of the said Philanthropic Academy being devoted to the purpose of gratuitously instructing and educating the poor and orphans of the Armenian nation resident in Calcutta, and also of providing gratuitously a limited number of such poor and orphans with board, lodging and raiment. It seems to me, therefore, that the object of the testatrix will be well carried into effect by directing the payment to the petitioners of the interest accruing due from time to time upon the fund in Court for the purpose of its being applied by them to the general purposes of the institutions, which they respectively represent.

It was suggested by Mr. Mayne, who appeared on behalf of the Governor of the Armenian Orphans' College at Madras, the residuary legatees under the will, that a reference to enquire as to the existence in Calcutta of such an Institution as the will describes would be proper; and certainly if there was any ground for doubt as to the fact, such a reference

ought to be directed. But a great number of years has elapsed since this will was proved in this Court, and no application for the legacy has been made on behalf of any such Institution, nor was Mr. Mayne able to state that his clients suggested any doubt upon the subject; and if there be no ground for doubting the fact sworn to, the fund should not be put to the expense of an unnecessary inquiry. 1863. *Oct. 28, Nov. 7.*

The Advocate General, as representing the Crown, supported the application of the petitioners, but suggested the propriety of some measures being taken to secure the fund, as the petitioners are not within the jurisdiction of this Court.

It appears, however, by the terms of the bequest that it is the interest of the fund only, which should be paid over half-yearly to the wardens or governors of these institutions; and the petitioners do not ask for the payment out of the principal sum. They do, however, ask for the payment out of the whole accumulation of interest, which has been going on since 1835, until the original sum of rupees 10,500 has grown to rupees 36,800 odd, and upon this application at all events, I think that the prayer of the petitioners ought not to be granted to that extent.

It is clear that it was not the intention of the testatrix to place a large lump sum in the hands of the officers of any institution, which should be the instrument for carrying out her charitable object—her intention was that they should only receive the interest half-yearly as it fell due and apply it at once for the benefit of those who were the objects of her bounty.

Further, if this Court should direct the payment of the whole accumulation of interest to these petitioners, their duty would be to invest it for the purposes of the charities which they represent; and it being already satisfactorily invested, I do not think that I ought to do more than order that the accruing interest on the accumulated sum be paid half-yearly to the petitioners or their duly constituted attorney.

The only other question is, whether any inquiry should be had before the Master as to the proportions in which the church of St. Nazareth and the Philanthropic Academy should be allowed to share the interest of this fund? I cannot see that any good would result from such inquiry.

1863. Oct. 28, Nov. 7.

There is nothing in the bequest itself to suggest any unequal division; and as the governors of the two Institutions concur in the application that each should receive a moiety, I do not suppose that there is anything in the circumstances of the two Institutions to render any other than an equal division desirable or proper. The costs of all parties as between solicitor and client will be taxed and paid out of the fund.

NOTE.—As to the jurisdiction over charities possessed by the late Supreme Court (and therefore by the present High Court) see *Attorney General* v. *Brodie*, 4 Moo. I. A. Ca. 190.

Original Jurisdiction (*a*)

Original Suit No. 120 *of* 1863.

RA'JENDRA RAU *against* SA'MA RAU and another.

The High Court has no jurisdiction to entertain a suit on an instrument stipulating for the payment of money generally, when the defendant resides beyond the local limits and such instrument was signed by him beyond those limits.

Jurisdiction to entertain a suit on a promissory note is *prima facie* shewn upon a plaint alleging that the note was delivered by the defendant at Madras and that he thereby promised to pay at Madras.

Remarks on the maxim *debitum et contractus sunt nullius loci.*

1863. Nov. 2 & 9. O. S. No. 120 of 1863.

THE plaintiff sued for rupees 3,806-2-10, being the balance of principal and interest due on a Telugu instrument, dated the 23rd July 1859, and signed by the defendants, who resided in the district of Coimbatore, in favour of the plaintiff and his late brother Gunḍu Rau deceased, on account of arrears of rent due for a bungalow at St. Thomas' Mount in the zila' of Chingleput. It appeared that the defendants laid claim to the bungalow and caused it to be sold by auction: the plaintiff and Gunḍu Rau accordingly sued the defendants and the purchaser in the court of the Principal Ṣadr Amín of Chingleput. The Amín decreed for the plaintiffs, declaring them entitled to the bungalow, and on appeal such decree was affirmed. The defendants thereupon signed the instrument in question at Mañjákkuppam in the district of Coimbatore, and paid in pursuance thereof three sums of rupees 450, rupees 35 and rupees 45, for which the plaintiff gave credit.

The following is a translation of the instrument:

" On the 23rd day of the month of July of the year 1859, Chintapanṭi Sáma Rau and Ráma Rau residing at Mañ-

(*a*) Present Scotland, C. J. and Bittleston, J.

jákkuppam Guḍalúru, at present carrying on livelihood by employment and being inhabitants of Chennapaṭṭanam (Madras), write and give the bond to these persons, (namely) Chintapanṭi Rájendra Rau and Gunḍu Rau, residing at Triplicane of Chennapaṭṭanam (Madras). That is to say—

"The garden bungalow and others situated at Parangi-kúndá (St. Thomas' Mount) of the ta'aluk of Sydapet in the zila' of Chingleput. In Original Suit No. 14 of the year 1851 of the Chingleput Principal Ṣadr Amín's Court and in Appeal Suit No. 94 of the year 1853, it was decided in your favour to the effect that the rent of the aforesaid garden bungalow and others should be paid by the defendants being the parties to the aforesaid suit. Up to the date of filing the aforesaid suit, the rent for ten months is 500 rupees at the rate of (50) fifty rupees per month, and the interest accruing for the same from the day on which the original decree was given by the aforesaid Principal Ṣadr Amín's Court, up to this day is rupees 370-13-4. The further rent subsequent to the aforesaid sum of rupees 500 decreed in the aforesaid suit from the month of January of the year 1851, when the aforesaid suit was filed, up to the 22nd day of the month of May of the year 1856, when the aforesaid garden bungalow and others were delivered to you by the aforesaid Court is rupees 3,235-5-6. Total amount of rupees 4,106-2-10, is due to you by the three defendants included in the aforesaid suit. Therefore out of the aforesaid amount we Sáma Rau and Ráma Rau have this day paid to you the sum of rupees 450. Deducting the same, the remainder is rupees 3,656-2-10. We bind ourselves to continue to pay the same month by month, either to you or to your order, according to what is particularized hereunder at the rate of (35) thirty-five rupees from the first day of the month of July of the year 1860. In case of our paying (2,000) two thousand rupees for this bond, at the rate of 35 rupees month by month according to what is mentioned above, and the interest at the rate of two annas per hundred rupees per month, then you should give up the remaining rupees 1,656-2-10. If we do not conduct ourselves according to the aforesaid condition and in case of our making default in respect of any one instalment, then immediately you are at liberty to recover from us without any objection the aforesaid sum of 3,656-2-10, together with

1863. Nov. 2 & 9. O. S. No. 120 of 1863.

the interest. While we are making payments in respect of this bond according to what is mentioned above or before the same, if the aforesaid sum of 3,656-2-10 be recovered by you from George Gilbert Keble Richardson, being the third defendant and a member of the firm of Ashton, Richardson and Co. at Madras, then the rupees received by you from us should be paid back to us together with the interest.

"K. SA'MA RAU.
"K. RA'MA RAU.

"Witnesses to this

"Ráchuru Subba Rau, I know.

"Jagannáthapuram Vaiddulá Sañjíva Rau, I know.'

"Triplicane Yajurveda Govindáchárya, I know.

"This was written in the handwriting of Jagannáthapuram Vaiddulá Narasiṅga Rau."

On the case coming on chambers before Bittleston, J. for settlement of issues, his lordship objected that the cause of action had not arisen within the local limits of the original civil jurisdiction of the High Court.

Mr. Branson, attorney for the plaintiff, said that the Chief Justice had recently directed a plaint upon a promissory note made at Jaulnah to be received upon the ground that under that note (as in the present case) the money was payable everywhere.

Bittleston, J. thereupon said that he would consider the question; and on the 9th November his lordship delivered the following

JUDGMENT:—Both defendants are resident in the district of Coimbatore, and the question therefore is whether the cause of action arose within the local limits of the original civil jurisdiction of this court? The suit is brought upon a written instrument, alleged in the plaint to have been executed by the defendants in Madras; but the evidence is that the contract was signed at Mañjákkuppam in the district of Coimbatore.

Further, it appears that the document was given on account of arrears of rent due for a house at St. Thomas' Mount in the zila' of Chingleput, and in consequence of a decision of the Civil Court of Chingleput in the plaintiff's favour.

Unless, therefore, it can be said that the cause of action arose in Madras, because the stipulation in the document is for the payment of money generally, no particular place of payment being fixed, and consequently for its payment everywhere, this Court has not jurisdiction to entertain the suit.

I took time to consider this question, because I was informed that the Chief Justice had directed a plaint upon a promissory note made at Jaulnah to be received upon the ground that the money was payable everywhere, but upon reference to the plaint (O. S. No. 261 of 1863) I find it alleged that the promissory note sued upon was delivered by the defendant at Madras and that the defendant thereby promised to pay at Madras; and the Chief Justice intended to decide no more than that jurisdiction was primâ facie shown upon a plaint so framed. That ruling is in accordance with the opinion which I expressed in *Winter* v. *Round(a)*, and does not affect the present question.

But the same question was raised in certain proceedings on the Appellate side of this Court under date 25th November 1862, and though the matter was disposed of upon a reference without any argument, it is proper that I should notice the decision then pronounced. That was an application by the Civil Judge of Bellary calling upon the High Court to enforce execution of a judgment of the Bellary Court within the territory of Mysore—which judgment the Mysore Court had refused to execute on the ground that it had been passed without jurisdiction—and upon that point the answer of the High Court to the Civil Judge was conveyed in these terms. "The objection taken to the jurisdiction of the Bellary Court now appears to be well founded; for the bond was executed and the defendant resides in the Mysore territory, and the money is by the terms of the bond made payable generally, without any stipulation as to place of payment."

To have ruled otherwise would have been to affirm the proposition that upon all instruments for the payment of money, in which there is no stipulation for payment at any particular place, the suit may be brought anywhere; but the

(a) Supra p. 202.

1863. Nov. 2 & 9. O. S. No. 120 of 1863.

Court thought that, though money payable under such an instrument is payable everywhere, the jurisdiction to entertain a suit thereon does not arise everywhere.

Consistently with this ruling I cannot hold that this Court has jurisdiction in the present case; and the ruling itself seems to me to be quite in accordance with the English authorities on the same subject. The maxim of the common law *debitum et contractus sunt nullius loci* was at a very early period restrained by statute (6 R. 2. c. 2) with the view of requiring that debt, account and other such actions should be brought in the country where the contract was made, and though that statute failed in accomplishing the object, it led to the adoption by the Courts of the practice of changing the venue upon an affidavit that the cause of action arose in another county than that in which the venue was laid and not elsewhere. See the notes to *Peacock* v. *Bell(a).* So as regards actions in inferior Courts it has always been held that the cause of action, that is, the whole cause of action, must appear to have arisen within the local limits of the Court's jurisdiction; and in *Comyn's Digest,* Title Courts (P. 9) many cases will be found illustrating the sense in which the Courts have employed the expression that the cause of action must appear to have arisen within the jurisdiction. In *Rex* v. *Danser(b)* the question was whether the cause of action on a promissory note arose within the jurisdiction of an inferior Court, the note having been signed and the consideration having been given out of the jurisdiction, and the Court held that it did not; but the money was payable generally upon that instrument, and if that circumstance would have justified the Court in saying that the cause of action arose wherever the money was payable, the decision should have been the other way.

In the 60th section of the English County Court Act (9 & 10 Vict. c. 95) the very same words are used as in the 12th sec. of the High Court Charter and in sec. 5 of the Civil Procedure Code; and the decisions upon that section confirm the view which I have expressed.

In *Wilde* v. *Sheridan(c)* Coleridge J. said "the question upon 9 & 10 Vict. c. 95, sec. 60, is whether the cause of

(a) 1 Wms. Saund. 74. (b) 6 T. R. 242.
(c) 21 L. J. Q. B. 260. 1 Bail C. C. 56, S. C.

action, that is, the whole cause of action, arose within the jurisdiction of the County Court" and held that it did not, on the ground that though there might have been a breach within the jurisdiction, (as the acceptance of the bill of exchange, on which the action was brought, was general and bound the defendant to pay everywhere) yet the contract was made elsewhere and therefore the whole cause of action did not accrue within the jurisdiction. See also *Re Walsh and Ionides*(a). 1863. *Nov.* 2 *&* 9. *O. S. No.* 120 *of* 1863.

I do not see any ground for supposing that the words of our Charter giving jurisdiction in cases in which " the cause of action" has arisen within the local limits of the ordinary original jurisdiction, are used in any different sense, and I come to the conclusion, therefore, that in this case, as the contract was not made in Madras, the Court has not jurisdiction to entertain the suit.

(a) 22 L. J. Q. B. 137. 1 E. & B. 383 S. C.

Appellate Jurisdiction (a)

Referred Case No. 12 *of* 1863.

SA'HIB RAUTAN *against* IBRAHI'M RAUTAN and another.

The discretionary power of a Judge to detain a defendant in custody otherwise than by committing him to prison in execution of a decree, is confined to the case provided for in Act XXIII of 1861, sec. 8.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore. Suit No. 67 of 1862 was brought for the recovery of rupees 32 due under a bond executed by the defendants. The Judge decided in favour of the plaintiff who moved for execution of the decree by issuing a warrant against the persons of the defendants. This was done in the form No. 12 of the forms accompanying the rules of practice of the Small Causes Courts. The defendants were accordingly produced before the Court and professed their inability then to pay the amount, but stated that they would do 1863. *November* 16. *R. C. No.* 12 *of* 1863.

(a) Present Scotland, C. J. and Holloway, J.

1863. November 16. R. C. No. 12 of 1863.

so in eight days. They did not apply for their discharge under section 273 of the Civil Procedure Code*(a)*. The plaintiff was willing to wait, but requested the Court to keep them in charge of a batta peon until the expiration of the eight days. The Judge made an order in accordance with such request. and now submitted the following questions for the decision of the High Court, first, whether a defendant, being arrested and brought before the Court in execution of a decree, the Court has any power to restrict his liberty otherwise than by ordering him to be imprisoned, and secondly, whether the Court is not bound to release him at once upon the plaintiff failing to take steps to imprison him.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the defendants in this case having been arrested and brought before the Court under a warrant in execution of the final decree in the suit, were at liberty to apply for their discharge under section 273 of Act VIII of 1859, and that not having done so, the Judge of the Small Cause Court ought properly to have committed the defendants to prison in execution of the decree, and thereupon, if necessary, fixed the sufficient subsistence money to be paid by the plaintiff. The discretionary power of the Judge to detain a defendant in custody otherwise than by committing him to prison in execution of the decree, is confined to the case provided for by section 8 of Act XXIII of 1861*(b)*.

(*a*) This section enacts that "any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge on the ground that he has no present means of paying the debt, either wholly or in part, or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court. The application shall contain a full account of all property of whatever nature belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with others, or by others in trust for him (except the necessary wearing apparel of himself and his family and the necessary implements of his trade), and of the places respectively where such property is to be found, or shall state that, with the exceptions above-mentioned, the applicant is not possessed of any property, and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints.

(*b*) This section enacts that "when a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in Section 273 of Act VIII of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader as to his then circumstances

1863.
November 16.
R. C. No. 14
of 1863.

Appellate Jurisdiction (a)

Referred Case No. 14 *of* 1863.

SHANMUGA *against* MEDDLETON.

Act XLII of 1860, sec. 6, does not alter or interfere with the jurisdiction of the Military Courts of Requests constituted by Stat. 20 and 21, Vict. chap. 66, sec. 67.

CASE referred for the opinion of the High Court by R. Davidson, Judge of the Court of Small Causes at Chittúr. The plaintiff in suit No. 1155 of 1863 sued the defendant, an European officer of the 21st Regiment Madras Native Infantry stationed at Vellore, for rupees 46-5-6, being wages due to him as the defendant's servant and the value of goods bought by him for the defendant's use. The Judge of the Small Causes Court adjourned the case for further consideration as to whether the suit was not barred by Act XLII of 1860 sec. 6, and requested the High Court, if it should think fit, to sanction the disposal by him of the suit. Section 6 of Act XLII of 1860 enacts that "Whenever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court under the provisions of this Act shall be heard or determined in any other Court having any jurisdiction within the local limits of the jurisdiction of such Small Cause Court. Provided that nothing in this Act shall be held to take away the jurisdiction which a Magistrate, or a person exercising the powers of a Magistrate or an Assistant or a Deputy Magistrate, can now exercise in regard to debts or other claims of a civil nature; or the jurisdiction which can be exercised by Village Munsifs or Village

and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed and why the defendant should not be discharged, and should the plaintiff fail to show cause, the Court may direct the discharge of the defendant from custody. Pending any enquiry which the Court may consider it necessary to make into the allegations of either party, the Court may leave the defendant in the custody of the Officer of the Court to whom the service of the warrant was entrusted, on the defendant depositing the fees of such Officer, which shall be at the same daily rate as the lowest rate charged in the same Court for serving process; or if the defendant furnish good and sufficient security for his appearance at any time when called upon while such enquiry is being made, his surety or sureties undertaking in default of such appearance to pay the amount mentioned in the warrant, the Court may release the defendant on such security."

(a) Present Scotland, C. J. and Phillips, J.

1863. November 16. R. C. No. 14 of 1863.

or District Pañcháyats under the provisions of the Madras Code, or by Military Courts of Requests, or by Cantonment Joint Magistrates invested with Civil jurisdiction under Act III of 1859, or by a single Officer duly authorized and appointed under the rules in force in the Presidency of Fort St. George and Bombay respectively, for the trial of small suits in military bazars, in cantonments, and stations occupied by the troops of those Presidencies respectively, or by Pañcháyats in regard to suits against Military persons, according to the rules in force under the Presidency of Fort St. George."

Statute 20 and 21 Vic. chap. 66 section 67 enacts that when troops are serving beyond the jurisdiction of the Courts of Requests or other Courts for enforcing small demands at Calcutta, Madras and Bombay respectively, "actions of debt and all personal actions against officers shall be cognizable before a Court of Requests composed of military officers, *and not elsewhere,* provided that the value in question shall not exceed 400 Company's rupees."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for our decision is "whether the claim being against a European military officer, the suit is barred by sec. VI, Act XLII of 1860."

Before the passing of Act XLII of 1860, the jurisdiction of Military Courts of Requests to try suits of the nature of that stated in the case, was clearly made exclusive of all other Courts by the enactment in section 67 of the Statute 20 and 21 Vict. cap. 66; and the point we have to consider is whether or not the express negative words of the section, "and not elsewhere," have been impliedly repealed by Act XLII of 1860, and concurrent jurisdiction in such suits given to Courts of Small Causes throughout the country. The construction of the Act at which we have arrived, after some doubt, is that it has not the effect of altering or interfering with the jurisdiction of the peculiar military tribunal constituted by the Statute. The proviso in section 6 of the Act is not simply a qualification of the enactment preceding it in the same section and providing for exclusive

jurisdiction. Its language is that nothing in the Act shall be held to take away the jurisdiction which can be exercised by Military Courts of Requests.

1868. *November* 16. *R. C. No.* 14 *of* 1863.

It must therefore be construed with reference to the other jurisdiction-sections (sections 3 and 4); and so construed, and, considering what the object and intention of the Act were, we come to the conclusion that it leaves in full force the provision in the Statute for the exclusive cognizance by Military Courts of Requests of suits like that in the present case.

Appellate Jurisdiction (*a*)

Special Appeal No. 156 *of* 1863.

RA'MEN NA'YAR.............................*Appellant.*
KANDAPUNI NA'YAR...................*Respondent.*

A káṇam-holder who denies his janmí's title forfeits his right to hold for twelve years.
Special Appeal No. 27 *of* 1862 (Supra p. 14) followed.

1863. *November* 21. *S. A. No.* 156 *of* 1863.

THIS was a special appeal from the decision of K. Kellu Náyar, the Principal Ṣadr Amín of Calicut, in Appeal Suit No. 659 of 1861, affirming the decree of the District Munsif of Calicut in Original Suit No. 290 of 1859. This suit was brought by a janmí to redeem a káṇam mortgage made in 1850. The defendant denied the janmí's title.

Karuṇágara Manavan, for the appellant, the defendant, contended that his client, even though he were a káṇam-holder under the plaintiff, could not be ousted before the lapse of twelve years from the date of the káṇam.

Mayne for the respondent, the plaintiff, was not called upon.

The Court delivered the following

JUDGMENT:—In *Special Appeal No.* 27 *of* 1862(*b*) the Chief Justice and Mr. Justice Phillips dismissed the special appeal of the second defendant, who had alleged a title altogether adverse to the plaintiff who alleged the first

(*a*) Present Frere and Holloway, J J.
(*b*) Supra p. 14.

1863. November 21. S. A. No. 156 of 1863.

defendant to be a holder on káṇam, and the second his assignee. The twelve years had, according to the plaintiff's showing, not run. There is no valid distinction between the hostile title set up by the assignee and one set up by the person found to be the original tenant on káṇam. Following therefore this latter case, which, moreover, appears to us to be consistent with the doctrine long established in Malabar that the holder on káṇam who denies his janmí's title entirely forfeits his right to hold for twelve years, we dismiss this special appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 17 *of* 1863.

PANCHANA'DA CHETTI *against* RA'MAN CHETTI and others.

Where a Court of Small Causes delivered final judgment and decree on the whole matter in dispute and more than a year but less than three years had elapsed from the date of the decree without any proceeding having been taken upon it:—*Held* that Act XIV of 1859, Sec. 20, applied, and that the plaintiff's application for a warrant in execution of the decree was not barred by lapse of time.

1863. November 28. R. C. No. 17 of 1863.

CASE referred for the opinion of the High Court by R. B. Swinton, Judge of the Small Causes Court of Tanjore.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for the decision of the High Court is,

"Whether the period of limitation applicable to a decree of a Court of Small Causes constituted under Act XLII of 1860, is three years as laid down in Section XX, Act XIV of 1859*(b)*, or the period of one year under Section XXII of the same Act."*(c)*

(*a*) Present Scotland, C. J. and Frere, J.

(*b*) This section enacts that "no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution.

(*c*) This section enacts that no process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue Authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application.

In this case there has been the final judgment and decree of the Court of Small Causes upon the whole matter in dispute in the suit, and to such a judgment and decree, section 20 of Act XIV of 1859, clearly applies. The Court is therefore of opinion that the Judge rightly decided that the plaintiff's application for a warrant in execution of the decree was not barred by lapse of time, though more than a year had elapsed from the date of the decree without any proceeding having been taken upon it.

1863. *November* 23. *S. A. No.* 17 *of* 1863.

Appellate Jurisdiction (*a*)

Referred Case No. 18 *of* 1863.

SIVARA'MAIYAR *against* SA'MU AIYAR.

In a suit on a bond it is for the plaintiff to prove the amount of the debt, and this will be done sufficiently in the first instance by proof of the execution of the bond. It is for the defendant to prove in answer, if he can, that such amount is less than the sum sued for.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore.

1863. *November* 23. *R. C. No.* 18 *of* 1863.

No counsel were instructed.

The facts appear from the following

JUDGMENT:—The question submitted for our decision is "whether, in a suit to recover on a bond, the burden of proving partial failure of consideration lay upon the defendant or upon the plaintiff?"

It was for the plaintiff to prove the amount of the debt in respect of which he sued. This, so far as his case was concerned, he did sufficiently in the first instance by proof of the execution of the bond. It was for the defendant to give evidence in answer, if he could, that the amount was less than the sum claimed by the plaintiff; and, in the absence of any such proof, the Judge rightly gave judgment for the plaintiff.

(*a*) Present Scotland, C. J. and Frere, J.

NOTE.—See *S. A. No.* 37 *of* 1855, Mad. S. J. 1855, p. 120.

Appellate Jurisdiction (a)

Referred Case No. 19 *of* 1863.

KA'MA'KSHI A'CHA'RI *against* APPA'VU PIḶḶAI.

A transaction is not necessarily a lottery within Act V of 1844 simply because a matter of whatever kind is agreed to be decided by lot.

Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each in his turn as determined by lot should take the whole of the subscriptions for one month :—*Held* that the agreement was not illegal, and that a suit might be brought on a bond given by one of the subscribers, who had received one month's subscriptions, to secure the payment of his subsequent monthly instalments.

1863. *November* 23. *R. C. No.* 19 *of* 1863.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore. The suit No. 1493 of 1863, out of which the case arose, was brought in the Small Causes Court to recover rupees 150, being rupees 70 balance of principal and rupees 80 being interest at 12½ per cent. per month, due under a bond dated the 20th July 1862 and to the following effect:

"Having this day borrowed on account of my necessities rupees 100, I promise to repay the same at the rate of rupees 10-0-0 on the 30th of each month, beginning from this month A'ḍi of Dundubhi (July-August 1862), up to Chittirai of Rudirodgári (April-May 1863), and to endorse the same in this bond, and, in default of any of the instalments, to pay the whole sum then remaining due with interest thereon at 12½ per cent. per month from the date of the bond."

At the hearing of the case, the plaintiff, upon being examined as a witness, stated that he, the defendant and eighteen others had entered into an agreement that each should subscribe the sum of rupees 200-0-0, by monthly instalments of ten rupees, each of the subscribers in his turn as determined by lot, taking the total subscription for one month; that the plaintiff was the agent in the business; that the defendant got his lot, that is the whole sum of 200 rupees, in the tenth month, and that he having already subscribed and paid rupees 100, the contested bond was taken from him for the remaining rupees 100 in order to ensure the future regular payment of his monthly instalments.

(a) Present Scotland, C. J. and Frere, J.

1863. *November* 23. *R. C. No.* 19 *of* 1863.

Upon the foregoing facts, the Judge was of opinion "that the suit was barred by Act V of 1844 and by general rules of good policy," and accordingly dismissed it without entering upon the merits of the case.

Act V of 1844—"An Act for the suppression of all lotteries not authorized by Government,"—enacts that in the territories subject to the Government of the East India Company "all lotteries not authorized by Government shall from and after the 31st day of March 1844, be deemed and are hereby declared common and public nuisances and against law."

The question for the decision of the High Court was whether or not the suit "was barred by Act V of 1844 or by general rules of good policy?"

George Branson, for the plaintiff. The agreement in respect of which the bond was given is not a lottery within the meaning of Act V of 1844. It is merely an arrangement under which each subscriber is entitled to a loan of the 200 rupees in turn, such turn to be determined by lot.

The Court delivered the following

JUDGMENT :—The suit was brought upon a bond given for part of a sum of money obtained upon loan from a common fund by means of the drawing of lots, and the question submitted for decision in effect is, whether or not the arrangement by which the loan had been obtained was illegal as being a lottery within the meaning of Act V of 1844, and we think the question must be answered in the negative.

Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the persons concerned, is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. It is to lotteries of this description that the Act, we think, must be construed to apply when declaring them to be "common and public nuisances and against law," and as such providing for their suppression. Here no such lottery appears to have taken place. It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all get a return of the amount of their contribu-

1863. November 23. R. C. No. 19 of 1863.

tions. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance, except perhaps as regards the payment of interest, which is only an ordinary incident of the contract of loan; and the benefit in this respect all, it seems, are intended to enjoy alike. The drawing of lots appears only to be made the means of deciding the order or turn in which the loan is to be made to each member.

There is in this, we think, nothing of that risk, speculation, and gaming which make ordinary lotteries a common and public nuisance, and which it was the policy and intention of the Act in question to provide against. The utmost that can be said is that it is an arrangement that, like many other unobjectionable matters of agreement, is very likely to be attended with litigation, and we think that a transaction is not necessarily a lottery within either the spirit or letter of the Act, simply because a matter of whatever kind is agreed to be decided by lot. For these reasons we are of opinion that the claim of the plaintiff was not affected by the provisions of the Act.

NOTE.—See *S. A. No.* 169 *of* 1857, Mad. S.D. 1858, p. 53.

Appellate Jurisdiction (a)

Criminal Petition No. 135 *of* 1863.

Ex parte SUPPAKO'N and others.

Fraudulent gain or benefit to the offender is not an essential element of the offence of false personation under sec. 205 of the Penal Code, and a conviction for false personation may be upheld even where the personation is with the consent of the person personated.

1863. November 23. Crim. P. No. 135 of 1863.

THIS was an appeal against the sentence passed by J. H. Blair, Acting Sessions Judge of Tinnevelly, on the prisoners in Case No. 48 of 1863.

The first prisoner was charged with having on the 6th February 1863 falsely personated Sangukón, the fourth pri-

(a) Present Scotland, C. J. and Frere, J.

1863. November 23. Crim. P. No. 135 of 1863.

soner, and in such assumed character falsely stated to the village authorities of Mudimanárkoṭṭai that he was Saṅgukón, owner of two bullocks which had been stolen and which he had discovered to be in possession of Paḻania Piḻḻai and Kupaiyaṇḍi Náyak, and further given a deposition to the same effect before the Sub-Magistrate of Tiruchili, and that he, the first prisoner, had thereby committed an offence punishable under section 205 of the Penal Code(*a*). The purpose of the false personation appeared to have been merely to save the fourth prisoner the trouble of making the complaints in person. The second, third and fourth prisoners were charged with having abetted the first prisoner in committing the said offence. The Sessions Judge found the four prisoners guilty, and sentenced them to one year's rigorous imprisonment.

Mayne, for the petitioners, the four prisoners, submitted that if the fourth prisoner abetted the act of the first prisoner, he must have authorised it, in which case the first prisoner was his agent and did not commit the offence of personation. There is, moreover, nothing to shew fraudulent gain or benefit to the offender which is essential to justify the conviction.

The Court was of opinion that the act of the first appellant amounted to the offence of false personation within the meaning of section 205 of the Penal Code, and that fraudulent gain or benefit to the offender was not an essential element of such offence. As, however, it did not appear that any fraudulent purpose was to be served, the sentence was reduced to six months' rigorous imprisonment.

(*a*) This section enacts that "whoever falsely personates another and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both."

Even where the prisoner personated an imaginary person, a conviction was upheld under this section : *Reg.* v. *Bhitto Kahar*, 1 Ind. Jur. 123. See sec. 416.

Appellate Jurisdiction (a)

Referred Case No. 21 *of* 1863.

DEVA RAU *against* VEṄKATESA ÁCHA'RIYA'R.

In a suit by A on a bond in favour of B the plaintiff may shew by oral evidence that the money secured by the bond was his own; but where B has died A must either entitle himself as B's personal representative or make B's personal representative a party to the suit.

1863. *November* 30. *R. C. No.* 21 *of* 1863.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore. The plaintiff sued for Rs. 74-5-8 and for Rs. 297-6-8 due respectively under two bonds in favour of one Kristṇabáyi his sister, deceased. He did not sue as her heir, or personal representative, but rested his claim on the ground that the moneys lent, to secure the repayment of which the bonds were given, were his own, his sister having been a mere namelender. Kristṇabáyi's personal representative was not a party to the suit.

The question submitted "whether it was open to the plaintiff to prove by oral evidence that certain money lent was his, the bonds being in the name of another person."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—We are opinion that it would be open to the plaintiff to show by oral evidence that the debt secured by the bonds was money advanced by him and on his behalf through his sister, the deceased, and so entitle himself to recover the amount due upon the bond in a suit properly framed: but to such suit it is obviously necessary that the personal representative of the deceased should be made a party. In the suit, as at present framed, the plaintiff cannot recover. He must either entitle himself as personal representative, or make the personal representative a party. Of course, if the bonds were made without any knowledge or notice on the part of the defendant that the funds were other than those of the deceased herself, he would be entitled to any defence, legal or equitable, which he would have been entitled to

(a) Present Scotland, C. J. and Holloway, J.

against the deceased herself, or her personal representative. For these reasons we decide, in answer to the question submitted, that, if the suit had been properly framed, the plaintiff might have proved by oral evidence that the money lent was his, although the bonds were in another person's name. 1863. *November* 30. *R. C. No.* 21 *of* 1863.

NOTE.—This case overrules *Special Appeal No.* 79 *of* 1860 Mad. S. D. 1860, p. 212. And see *S. A. No.* 230 *of* 1859 ibid. p. 98.

Appellate Jurisdiction (a)

Regular Appeal No. 25 *of* 1862.

CHENNAPA NA'YUḌU.........................*Appellant.*

PITCHI REḌḌI and others...................*Respondents.*

Even with the permission of the Civil Court a separate suit cannot be brought for mesne profits between the institution of the original suit and the execution of the decree thereon.

Act XXIII of 1861, sec. 11 commented on.

THIS was a regular appeal against the decree of E. F. Elliott, Acting Civil Judge of Nellore, in Original Suit No. 18 of 1862, which had been instituted on the Civil Court's order on Miscellaneous Petition No. 158 of 1862. The plaintiff sued the defendants for rupees 1,212, being the value of grass of which the defendants had deprived the plaintiff for four years, at rupees 303 a year, between the institution of Original Suit No. 8 of 1858, before the late Principal Ṣadr Amín of Nellore, to recover lands on which the defendants were alleged to have encroached, and the execution of the decree in the same suit. The defendants pleaded that the institution of the separate suit for the loss of grass said to have been occasioned in the disputed land pending the final decision of the original suit was opposed to Sec. 9 of Act XXIII of 1861. The Civil Judge decreed that the defendants should pay the plaintiffs rupees 909, observing, however, that the institution of the suit appeared irregular under Sec. 11 of Act XXIII of 1861. 1863. *November* 30. *R. A. No.* 25 *of* 1863.

Rañgáyya Náyuḍu, for the appellant.

Mayne, for the respondents.

The Court delivered the following

(a) Present Scotland C. J. and Holloway, J.

1863. November 30. R. A. No. 25 of 1863.

JUDGMENT:—This suit was brought for the value of grass which had become due to the plaintiffs between the institution of the suit and the execution of the decree.

The Acting Civil Judge decreed a portion of the amount sued for but without costs, and expressed his opinion that the matter ought to have been disposed of by the order of the Court executing the decree and not by separate suit.

The question is to be determined by the words of section 11, Act XXIII of 1861, which are "all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interests which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal." Nothing can be more precise than these words: they indicate positively the procedure which ought to be adopted, and declare that the procedure here taken shall not be adopted. That the Civil Court ordered the suit cannot put the plaintiffs in a better position, because it is clear that there was no authority to make such an order, and because when the amount collected as mesne profits was improperly returned to the defendants an appeal was by the express words of this section open to the plaintiffs.

The decree of the lower Court must be reversed; but in consequence of the errors having been committed under the sanction and by the express direction of the Judge, we think that each party should bear his own costs.

Appeal allowed.

Appellate Jurisdiction *(a)*

Regular Appeal No. 51 *of* 1863.

NA'RA'YA'ṆA DEVU........................*Appellant.*

HARISCHENDANA DEVU.................*Respondent.*

A zamíndár has no more power to charge a perpetual annuity in favour of a stranger on the income of the zamíndárí than he has to alienate the corpus.

THIS was a regular appeal against the decree of the Agent's Court at Ganjam, in Original Suit No. 9 of 1863.

1863. *November* 30. *R. A. No.* 51 *of* 1863.

Mayne, for the appellant.

Sloan, for the respondent.

The facts appear from the following

JUDGMENT :—The plaintiff, the maternal nephew of a former zamíndár, sues for an annuity granted to him by that zamíndár.

The defendant, the successor, denied his liability.

The Agent decided that the act of the former zamíndár was not binding upon his successor.

The case made by the pleadings is that the deceased zamíndár granted an annuity, and being unable to pay it assigned land, part of the zamíndárí, which has since been recovered from the plaintiff. It is not alleged that the plaintiff has any right to maintenance as against the present defendant, nor is it alleged that the annuity can be considered otherwise than as a charge upon the income of the zamíndárí. It is quite clear on these facts that the deceased zamíndár could no more charge a perpetual annuity upon the income of the zamíndárí, than alienate the corpus. That he could not so alienate has been frequently decided. The result is that this appeal is dismissed with costs.

Appeal dismissed.

(*a*) Present Scotland, C. J. and Holloway, J.

NOTE.—See *Special Appeal No.* 15 *of* 1862, supra p. 141, *Special Appeal No.* 114 *of* 1862, supra p. 349. *Anund Lal Sing Deo* v. *Maharaj Dhera Gurrud Narayun Deo* 5 Moo. I. A. 82 : *Chetty Colum Comara Vencatachella Reddyer* v. *Rajah Rungasawmy Streemunth Iyengar Bahadoor,* 8 Moo. I. A. Ca. 319.

Original Jurisdiction (a)

Original Suit No. 131 *of* 1863.

NARASIMMA *against* KISTNAMA and others.

One co-defendant whose interests are separately represented, may cross-examine another.

1863. *December* 10. *O. S. No.* 131 *of* 1863.

THIS was a suit for division of family property. At the conclusion of the direct examination of the second defendant, whose evidence was strongly in favour of the plaintiff, *Stokes,* for the first defendant, proposed to cross-examine.

The Advocate General (Smyth) objected, and referred to the old Equity practice in England, according to which the answer of one defendant was not evidence against another, and could not therefore be cross-examined upon by the latter.

SCOTLAND, C. J.—We are many years in advance of that. The second defendant is a witness under examination, and has given evidence opposed to the interests of the first defendant. One co-defendant whose interests are separately represented may certainly cross-examine another with a view of discrediting evidence which the latter may have given in the plaintiff's favour.

BITTLESTON, J. concurred.

The second defendant was then cross-examined.

The Advocate General and *Norton* for the plaintiff.

Stokes and *Arthur Branson,* for the first defendant.

Mayne, for the second defendant.

(a) Present Scotland, C. J. and Bittleston, J.

Appellate Jurisdiction (a)

Referred Case No. 24 *of* 1863.

ANNA'GURUBALA CHETTI *against* KRISTNASVA'MI NAYAKKAN.

When a plaintiff attempts to enforce as a contract of loan binding upon the defendant immediately upon its execution an instrument which he verbally agreed at the time should not so operate, and for which the defendant received no consideration, the latter may give evidence of the verbal agreement.

CASE referred for the opinion of the High Court by R. B. Swinton, the Judge of the Court of Small Causes at Tanjore. 1863. *December* 14. *R. C. No.* 24 *of* 1863.

Suit No. 1565 of 1863 was brought for rupees 272, being principal and interest due under a bond, dated 25th August 1860, given by the defendant to the plaintiff and in the following terms:—"Having borrowed of you on account of my necessities Company's rupees 200, and having received the same in ready cash on my inspection I will repay it with interest at one per cent. per month whenever the owner demands." The defendant proposed to prove by oral evidence that the consideration for the bond was, not the loan of 200 rupees therein mentioned, but the plaintiff's abstaining from interfering to prevent the defendant obtaining another loan of rupees 5,000 which he was then negotiating, and that the plaintiff "did not so abstain or use his favourable influence to get the loan," that such loan was not negotiated, and that therefore the amount secured by the bond was not due. The Judge thought the oral evidence inadmissible, but submitted the question hereinafter mentioned.

No counsel were instructed.

The facts appear from the following

JUDGMENT:—The question submitted for our decision is, "whether the defendant could prove by oral evidence that the receipt of rupees 200 by the plaintiff was to depend upon the plaintiff's action regarding another loan, and that the plaintiff did not take such action regarding the other loan."

(a) Present Scotland, C. J. and Frere, J.

1863. December 14. R. C. No. 24 of 1863.

The defendant does not deny the execution of the instrument sued upon, nor the terms of it. But he seeks, as it appears to us, to shew that there was no consideration received for it, and further that it was expressly declared and agreed when the instrument was signed by the defendant, that it was not to operate as a binding contract except in the event of the plaintiff giving his aid as promised, in obtaining the loan of 5,000 rupees mentioned in the case ; and that it was executed and received by the plaintiff upon that understanding. In effect, that the instrument never became a binding agreement with the plaintiff. If what the defendant alleges be true, the plaintiff is attempting to enforce, as a contract of loan binding upon the defendant immediately upon its execution, an instrument, which he verbally agreed at the time should not so operate and for which the defendant has received no consideration. We are of opinion that it was open to the defendant to give evidence of the alleged verbal arrangement entered into at the execution of the instrument. There is, no doubt, risk in admitting such evidence, and it should certainly be received with great caution and very scrupulously considered ; but, if the defendant's case be true, and the evidence were excluded, the plaintiff would be assisted in practising a deceit upon the defendant.

For these reasons, we answer the question submitted in the affirmative.

Appellate Jurisdiction (a)

Referred Case No. 25 *of* 1863.

CHINNAM AYYAPPA *against* SHEKH PI'R AHMAD.

A rázínáma stipulating for the payment of a debt into Court by periodical instalments prolonged beyond one week may be received and enforced in a Small Cause.

1863. *December* 14. *R. C. No.* 25 *of* 1863.

CASE referred for the opinion of the High Court by Purushottam, the District Munsif of Vizagapatam.

The plaintiff sued for rupees 32 due upon three bonds executed in his favour by the defendant. When the case came on for hearing the parties presented a rázínáma providing that rupees 23-8 with costs and further interest should be paid into Court by monthly instalments of two rupees each, and that in default the amount should be recovered from the defendant by a warrant of the Court. The Munsif upon the foregoing facts was of opinion that rázínámas containing such stipulations should not be accepted and enforced in small causes "as," said he, "the terms of the adjustment seemed to me to be inconsistent with the object of the system and mode of their trial and disposal. According to the tenor of the rázínáma in the case under reference, the plaintiff may take out process of execution on it at any time within the period prescribed for the execution of decrees in regular suits, whereas by para. 14 of the Rules of Practice issued by the High Court under date the 22nd September last for the guidance of the District Munsif in trying small causes, the term for issuing warrant on any decree or order is limited to one week from the date of passing the same; and section 10 of Act XLII of 1860 seems to contemplate the same course. The pleader for the plaintiff, in the present case argued that the rázínáma could be received under section 98 of the Code of Civil Procedure in the absence of any express provision to the contrary in the Acts and Rules now in force for the guidance of Courts in trying small causes."

The Munsif submitted the question hereinafter set forth.

No counsel were instructed.

The facts appear from the following

(a) Present Scotland, C. J. and Frere, J.

1863. December 14. R. C. No. 25 of 1863.

JUDGMENT:—The question submitted for our decision is, "whether a rázínáma containing stipulations for the payment of a debt into Court by periodical instalments prolonged beyond one week may be received and enforced in a small cause court?"

We think it was open to the parties to enter into the rázínáma, and to obtain as they have done a decree of the Court in accordance therewith. Section 13 of Act XXIII of 1861, which supersedes Section 10 of Act XLII of 1860, the section referred to by the District Munsif, is merely directory and provides in favour of plaintiffs for the granting of immediate execution at the discretion of the Court; and rule 14 of the practice rules relating to the trial of Small Causes provides for the lapse of a week from the date of passing the decree *before* the issuing of execution, unless immediate execution shall have been granted, not that execution shall not issue *after* a week from such date.

We therefore answer the question submitted in the affirmative.

Appellate Jurisdiction (a)

Special Appeal No. 365 *of* 1863.

VEṄKATA REḌḌI.......................*Appellant.*
PARVATI AMMA'Ḷ and others.......*Respondents.*

A *drishṭabandhaka*, or Hindú instrument by which visible property is mortgaged, which named a time for payment of the money borrowed and stipulates that on default the mortgagee shall be put into exclusive possession and enjoyment of the property, will not be treated strictly as a conditional sale, even though the instrument expressly provide that on default the transaction shall be deemed an outright sale; and in a suit by the mortgagee for possession, the Court, in decreeing the right thereto, will give the mortgagor a day for redeeming.

1863. December 14. S. A. No. 365 of 1863.

THIS was a special appeal against the decree of the Civil Judge of Nundial, in Regular Appeal No. 22 of 1862, modifying the decree of the District Munsif of Nundial in Original Suit No. 1272 of 1861. The plaintiff sued for possession of a house and granary situate in the village of Revanúr in the ta'aluḳ of Kovilakuntla. The first defendant's husband, Víraređđi, had borrowed money from the

(a) Present Scotland, C. J. and Frere, J.

plaintiff, and to secure the debt executed an instrument in his favour, dated the 24th November 1854, of which the following is a translation : 1863. December 14. S. A. No. 365 of 1863.

"Bond executed to Çrímatu Mallu Désireḍḍigári Veṅkaṭa Reḍḍi [plaintiff] by Redemgudúr Víraredḍi [first defendant's husband], residing in the said village on the 5th Márgaçírsha Çuddha of Ánanda [24th November 1854.]

I have, owing to my urgency, borrowed of you in cash (4¾) pagodas four and three quarters, which I shall repay you with interest at $\frac{3}{16}$ V. per pagoda per mensem within six months from this date. In default, I shall, *considering this as an outright sale,* place in your possession, in satisfaction of the amount of principal and interest, the moiety on the east side, of (the house called) Padasala Yaddula Middé which I now occupy, besides the part already mortgaged to Bodicherla Veṅkaṭaguruvappa ; and also the two tuṇḍus and half aṅgaṇamu attached to the said house, and the whole of the ground thereunto belonging. To this I or my heirs shall not object in future. I thus execute this bond of my consent.

(Mark of) VI'RAREḌḌI.

The husband then left the country and was taken by all parties to be dead. His widow, the first defendant, borrowed a further sum from the plaintiff, and to secure its repayment executed a second instrument, dated March 24th 1857, in the plaintiff's favour, of which the following is a translation :

"Bond executed to Çrímatu Mallu Désireḍḍigári Veṅkaṭa Reḍḍi by Redemgudúr Víraredḍi's widow, Parvati Ammáḷ on the 13th Phálguna Bahula of Nala, (24th March 1857.)

"Owing to my urgency, I have borrowed of you in cash, on account of Bodicherla Veṅkaṭa Chinna Guruvappa, Gadi Chanki pagodas (6) six. In satisfaction of the sum, I this day put in your possession (besides the moiety on the east side of Padasala Yaddula Middé (house) which is already in your possession), the upstair house of two beams (called) Kondituntala Paru Meddé on the west side, which is now in possession of the said Bodicherla Chinna Guruvappa ; the

1863. December 14. S. A. No. 305 of 1863.

empty granary in front of the house; and the empty ground in front of Sandari house in the Avaránam. I shall not therefore object either to your renting it out to others, or to keeping there your own things. But as the house and ground are placed in your possession in lieu of interest on the principal, you ought to use them without rent. I shall repay the said principal, and take back possession of the said spot of ground on the 13th Phálguna Bahula of Pingala, (March 1858) which is next to this year. In default of my repaying the same within the said term, I shall put in your possession the ground formerly mortgaged by my husband, together with the ground mortgaged by me, and remove myself to another place. I thus execute this bond of my consent.

(Marked) PARVATI AMMA'L."

Default was made in repayment of both loans. The District Munsif adjudged the proprietary right to be in the plaintiff and decreed to him possession absolutely. On appeal the Civil Judge modified the Munsif's decree, and decreed simply that the first defendant should pay the plaintiff the principal sums due with interest.

Mayne, for the appellant, the plaintiff, contended that the plaintiff became absolutely entitled to the house upon default made in repayment, and cited *Special Appeal No.* 682 *of* 1861*(a)*.

Arthur Branson, for the respondents, the defendants, submitted that the instruments were mere mortgage securities, and cited *Special Appeal No.* 90 *of* 1859*(b)*: *Special Appeal No.* 155 *of* 1859*(c)*. *Special Appeal No.* 272 *of* 1860*(d)*. Under the decree the plaintiff might realize the debt and costs by sale of the property and so have all the benefit of the security.

Mayne in reply.

The Court delivered the following

JUDGMENT:—This was a suit to recover certain property that had been mortgaged as security to the plaintiff, for the repayment of loans of money, by two written instruments—the one executed by the first defendant's husband

(a) Mad. S. J. 1862, p. 81. (b) Mad. S. Dec. 1860, p. 26.
(c) Mad. S. Dec. 1860. p. 40. (d) Mad. S. J. 1861 p. 20.

and the other by the first defendant herself when a widow—default having been made in repayment of the loans. Both the lower Courts have found these instruments to be genuine and valid, and have given judgment in favour of the plaintiff, but they have passed different decrees. The original Court, adjudging the proprietary right to be in the plaintiff, has decreed to him possession absolutely. The Civil Court in modification of that decree has passed a decree simply for payment by the first defendant of the principal sum due to the plaintiff with interest, on the authority, as it appears, of decisions of the late Madras Ṣadr Court.

1863. *December* 14. *S. A. No.* 365 *of* 1863.

The plaintiff has appealed against the decree of the Civil Court; and on his behalf it was contended that under the written instruments he became entitled to the property upon default made in repayment, and ought consequently to have a decree for possession. For the defendants (the respondents) it was urged that the instruments operated only as mortgage securities, and that under the decree the plaintiff might realize the debt and costs by sale of the property in execution and so have all the benefit of the security. In the course of the argument reference was made to the Ṣadr Decisions at pages 26 and 40 of the Reports of 1860, page 20 of the Reports of 1861 and page 81 of the Reports of 1862. The first three of these decisions justify strictly the decree of the Civil Court; but in the fourth the Court appears to have regarded the specific charge or lien upon the property created by the mortgage instrument in preference to other claims, and to have expressly decreed a sale in satisfaction of the mortgage claim. These decisions tend certainly to cause doubt and uncertainty as to whether the present form of suit can be brought, and as to the mortgagee's right to a decree for possession; and we are called upon to consider them and say what in our judgment is the proper decree.

The relief sought by the plaint is not simply the recovery of the mortgage debt but exclusive possession; and the right to such relief is based upon the ground, that the mortgage instruments operated as absolute sales to the plaintiff of the mortgagor's proprietary right upon default made as therein provided, and entitled the plaintiff to immediate possession. In effect therefore this is a suit by the

1863. December 14. S. A. No. 365 of 1863.

mortgagee to obtain possession and to extinguish or foreclose all right and interest of the mortgagor and those claiming under her; and in order to decide as to the decree we must consider what, as regards possession, were the rights of the mortgagors and the plaintiff as mortgagee, equitable as well as legal, under the mortgage instruments. They appear to be of the class of securities termed in Hindú law *Drishṭabandhaka*(a). The property is mortgaged, and a time is named for payment of the money borrowed, and it is stipulated that on default the mortgagee shall be put in exclusive possession, and enjoyment of the property, one of the instruments expressly providing that it should be considered "as an outright sale." The plaintiff, then, as a matter of contract, has, by reason of default in payment, acquired a right to demand and sue for possession of the property; and if the instruments of security were to be treated strictly as conditional sales, and default in payment as amounting to an immediate absolute forfeiture of all the mortgagor's proprietary right, the plaintiff was entitled in this suit to have the proprietary right of possession at once decreed to him. Instruments of this nature seem at one time to have had this strict operation given to them by the Courts: but it must now, we think, be taken that the law upon equitable grounds will not enforce the absolute right to immediate possession. Where the instrument appears clearly (as in this case) to have been entered into by the parties for the purpose of securing the repayment of a loan, the mortgagor, making the security subservient to the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment has been allowed to pass by; and in a suit for the recovery of possession, so as in effect to foreclose or conclude all right of the mortgagor in the property (which the mortgagee is entitled to bring,) the Court, in decreeing the right to possession, should at the same time secure to the mortgagor an opportunity of redeeming the property, as he might have done before suit, by payment within a fixed time of the ascertained debt and interest which the mortgage-instruments were given and intended to secure.

(a) A mortgage (*bandhaka*) of real, substantial, *visible* (*drishta*) property, under which the mortgagor remains in possession till the stipulated time arrives, Colebr. in 2 Strange H. L. 467, 469.

For these reasons we think the proper decree to make in the suit is that the plaintiff do recover the possession and enjoyment of the house and land, unless within three months(*a*), which appears to be a reasonable time, the defendants pay to the plaintiff the full amount of principal and interest found by the Civil Court to be due; but that upon such payment being made within the time specified all right and interest of the plaintiff under the said mortgage-instruments shall cease, and the said instruments be given up to be cancelled.

1863. *December* 14. *S. A. No.* 365 *of* 1863.

The decree of the Civil Court will be modified accordingly, and the appellant and respondents will respectively bear his and their own costs of this appeal.

Appeal allowed.

NOTE:—When a *bonâ fide* sale is accompanied by a power to repurchase this will not make the transaction a mortgage, if such does not appear to have been the intention of the parties. "The best general test of such intention is the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such repurchase: if there is no such power there is no mortgage." Dart, Vendors and Purchasers, 3d ed. 536. Sugd. V. and P. 13th ed. 166. Coote Mortg. 3d. ed. 14, 21. *Perry* v. *Meddowcroft,* 4 Beav. 197, 203: *Verner* v. *Winstanley,* 2 Sch. & Lefr. 393: *Sevier* v. *Greenway,* 19 Ves. 413: *Neal* v. *Morris,* Beat. 197: *Bell* v. *Carter,* 17 Beav. 11: *Muttyloll Seal* v. *Anundchunder Sandle,* 5 Moo. I. A. Ca. 72, 81. *Ogden* v. *Battams,* 1 Jur. N. S. 791: *Alderson* v. *White,* 2 DeG. & J. 97.

Appellate Jurisdiction (*b*)

Special Appeal No. 383 *of* 1863.

SUNDARAMURTI MUDALI..........................*Appellant.*

VALLINA'YAKKI AMMA'Ḷ..........................*Respondent.*

Each holder of a Çrotriyam conferred for lives can only alienate his own life-interest.

THIS was a special appeal against the decree of A. W. Phillips, the Civil Judge of Chingleput, in Appeal Suit No. 120 of 1860, affirming the decree of T. Alagayya Piḷḷai, the Principal Ṣadr Amín of Chingleput, in Original Suit No. 9 of 1860. This suit was brought by the respondent as

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(*a*) In English Courts of Equity the common decree for foreclosure *six* calendar months (from the date of the Chief Clerk's certificate) for payment to the plaintiff of principal, interest and costs. 2 Spence 652: Seton, Dec. 3rd ed. 364.

(*b*) Present Scotland C. J. and Frere, J.

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widow and heir of one Kumarasvámi Mudali to recover (inter alia) the four çrotriyam villages of Palanúr, Kolambákam, Kílvólam and Erupákam in the Madurantakam ta'aluk and rupees 4,792-9-7 being the value of mélváram grain due upon the said çrotriyam for faṣlís 1268, 1269 exclusive of expenditure. The çrotriyam had been granted to one Ténappa Mudali for three lives of which his own was one. He left no issue but adopted a son, Kumarasvámi Mudali, who succeeded as the second life. Kumarasvámi also died without issue, but was survived by Sundaramurti Mudali, the appellant, a son of his natural born sister. It appeared that Kumarasvâmi wished Sundaramurti to be his heir, but no adoption of the latter by the former had, or could have, taken place, and a claim which Sundaramurti made as abhimánaputra(a) was not insisted upon at the hearing. Kumarasvámi, however, devised the çrotriyam to Sundaramurti Sámi, and the question was whether this devise was valid as against the claim of Kumarasvámi's widow and heir the respondent. The Principal Ṣaḍr Amín, and, on appeal, the Civil Judge decided in favour of the widow.

Mayne, for the appellant, the defendant, contended that the çrotriyam was alienable and passed under Kumarasvámi's will. He referred to Madras Reg. IV of 1831, ("a regulation for better securing to the grantees personal or hereditary grants of money or of land-revenue, conferred by the Government, in consideration of service rendered to the State, or in lieu of resumed offices or privileges, or of zamíndárís or palaiyams forfeited or held under attachment or management by the officers of Government or as yaumiás or pensions") and Act XXXI of 1836, sec. 3 of which enacts that 'the grants referred to in the preceding section shall not be liable to attachment or sequestration, in satisfaction of any decree or order of Court, *save and except for the discharge of debts or obligations personally incurred by the holders of them*" and to Act XXIII of 1838 by which the words in italics are repealed.

Norton, for the respondent, the plaintiff, submitted that a çrotriyam-holding was in the nature of a tenancy in tail and inalienable beyond the lifetime of the actual holder. He

(a) From Skr. *abhimána* 'affection' and *putra* 'son.'

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cited *Special Appeal No.* 6 of 1860*(a)*, *Special Appeal No.* 29 of 1848*(b)*, and referred to the Circular Orders of the Board of Revenue I. 281*(c)* "In bestowing çrotriyams and similar grants the claims of the coheirs are for consideration of Government, before the grant is issued; but once issued, the courts are bound to decide according to its terms. They cannot question the propriety of the grant or the injustice indirectly done to other claimants by its issue. By grant of a çrotriyam clearly to the grantee and his heirs his coheirs are excluded by the solemn act of Government." Pro. S. 'A. 3rd Septr. 1838, Ex. Min. Cons. 2nd Octr. 1838, C. O. B. R. I, 220: "Succession to çrotriyam directed to be registered in the name of the eldest son of the deceased although a brother and two other sons were living. The same course was directed to be adopted in all other cases, but the rights of sharers were recognized and they were left to make arrangements among themselves." Ex. Min. Cons. 4th September and 20th Oct. 1848.

Mayne, in reply. *Special Appeal No.* 6 *of* 1860, even if it were rightly decided, turns altogether upon the terms of a special grant by a private person.

SCOTLAND, C. J.:—If a çrotriyam was alienable why should the legislature take care to protect it against the çrotriyam-holder's creditors? It would be most unreasonable to allow a man to alienate property and at the same time to forbid his creditors to come upon it.

(*a*) Mad. S. D. 1860 p. 173. In this case property had been given on condition that it should neither be sold nor mortgaged by the donee. A creditor having obtained a decree against the donee and attached the property in question the donor's heir contended that the condition was broken and sued for the property. The Acting Civil Judge of Cuddalore, G. Ellis, dismissed the suit, holding that the attachment was no violation of the condition. But on appeal the Sadr Court reversed his decision, observing that "the exhibit C shows that the donor's object was to insure the possession of the property in question by the first defendant's father and his descendants, and that it was for this end alone that the transfer was made. They consider it clear that on the extinction of the family of the donee the property would revert to that of the donor, the gift being of the character of an ina'am confined by strict entail. Any sort of alienation of the property would make void the above purpose and be a transfer of the gift to others whom the donor had no intention to benefit. The Court hold therefore that the property is not available for the third defendant's decree; at the same time they observe that the exhibit C gives the plaintiff no power to resume the property so long as any of the donee's family exist." *Quære* as to this decision, and see *Avison* v. *Holmes* 1 Johns. & H. 530: *Lear* v. *Leggatt* 1 Russ. & My. 690. *Croft* v. *Lumley* 6 H. L. Ca. 731.

(*b*) Mad. S. D. 1849 p. 51.

(*c*) Cited in Sloan's *Judicial and Land Revenue Code* I. 459.

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Mayne. There is an obvious distinction between a willing alienation and one by a proceeding *in invitum.*

SCOTLAND, C. J.:—The authorities on the subject are few and have been so thoroughly sifted before us, that I think I may without further consideration express my present opinion. The first question is what is the nature of the çrotriyam tenure. Originally a çrotriyam appears to have been an assignment to a *çrotriya* or Bráhman well-read in the Vedas*(a)*. But now it has got the wider signification of a grant by Government to a private person in consideration of service rendered by himself or a member of his amily, of a portion of the land-revenue or of a village or land, either in perpetuity or for a limited number of lives, at a moderate rent, on failure to pay which it is liable to resumption and forfeiture. The object of the grant, as in the case of the parliamentary entails in England, is the maintenance of the original grantee and his descendants in a position of social respectability, commensurate to the services rendered, so long as the grant continues. In the present case the grant of the çrotriyam is not before us, but it no doubt contained an express limitation of the villages to the çrotriyam-holder and his heirs. We have here, however, an admission by all parties that the four villages in question were çrotriyam and the order of the Board of Revenue referred to by Mr. Norton, and it must be taken, I think, that the grant was to the original grantee and his heirs. Then, as to the authorities bearing upon the question of the alienability of çrotriyams, two cases have been referred to, and of these one, *Special Appeal No.* 6 of 1860*(b)*, if it applied to çrotriyams, would be a strong authority, but this does not appear, and the decision cannot be regarded as authority on the point in the present case. With respect to the order of the Revenue Board, it merely goes to shew that in all cases the enjoyment of the land granted is considered as strictly limited by the terms of the grant and that the çrotriyam-holding is regarded as of the nature of a strict entail and inalienable by the donee. Then there is *Special Appeal No.* 29 *of* 1848*(c)*. That was undoubtedly

(*a*) *Çruti* (κλυτός) in contradistinction to the *Smṛiti* 'Law.'

(*b*) Mad. S. D. 1860 p. 173.

(*c*) Mad. S. D. 1849 p. 51.

a case on a çrotriyam, and there it was held that the original holder could not charge the çrotriyam for the maintenance of the plaintiff's ancestor, and that such charge was invalid, even though the grant had been renewed by the succeeding inheritors. This is a strong authority to show that the çrotriyam-holder has no absolute control over the çrotriyam such as Mr. Mayne contends for.

These authorities go to support Mr. Norton's contention. Furthermore, assuming this to be a çrotriyam-grant made in consideration of personal service, Reg. IV of 1831 applies strongly against any right of alienation. It recites :—" Whereas it is just and expedient that personal or hereditary grants of money, or of land revenue, conferred by the Government in consideration of services rendered to the State should be strictly applied to the purpose for which they have been granted ; and should not be liable to be diverted from that purpose to the use or benefit of persons who have no claim upon the State." The Regulation then goes on to provide that " the Courts of 'Adálat are hereby prohibited from taking cognizance of any claim to hereditary or personal grants of money, or of land revenue, however denominated, conferred by the authority of the Governor in Council in consideration of services rendered to the State unless the plaint is accompanied by an order signed by the Chief or other Secretary to Government referring the complaining party to seek redress" in those courts. This Regulation applies to all çrotriyams, and they are clearly recognized and treated as strictly settled and not capable of being directed from the purpose for which the grant was made. The Government as donor of the original grant is considered to have a continuing interest in the grant which may at some time revert, like the reversion in the donor of an estate in life or of an estate in tail on failure of issue of the grantee. Then the provision which follows, that " the power to decide on such claims is reserved exclusively to the Governor in Council" is quite inconsistent with the notion that there are independent rights under the grants in question which the grantees may at any time alienate absolutely. Then section 3 provides that " the grants referred to in the previous section shall not be liable to attachment or sequestration in satisfaction of any decree or order of court;" and

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the rest of the section—" save and except for the discharge of debts or obligations personally incurred by the holders of them"—is repealed by Act XXIII of 1838. Nothing, as it seems to me, could more distinctly shew that the legislature understood that, legally, grantees of çrotriyam lands could not dispose of them. The Regulation is intended to guard against the diversion of the proceeds of land comprised in such grants, even during the lifetime of the donee. Mr. Mayne contends that this does not amount to a prohibition of the right to alienate. But when I read the Regulation and the Act together, and consider how unreasonable it would be to protect against creditors the proceeds of property which the debtor had a right to dispose of, it seems impossible to avoid the conclusion that the Regulation clearly recognizes the law to be that a çrotriyam is inalienable by the holder.

Looking at the whole case, and the principle upon which such grants are made, and grounding my judgment on legislative exposition, which appears to me to show that çrotriyams are in the nature of estates tail in strict settlement, I am of opinion that the defendant has failed to make out his case, and that the appeal must consequently be dismissed.

FRERE, J. concurred.

Appeal dismissed.

NOTE.—The right of an adopted son to succeed to a çrotriyam was recognized by the Court of Directors 30th May 1843. C. O. B. R. I. 406, and by Government ibid. I. 407, 408. So the right of a widow to succeed to a çrotriyam during life has been recognized Ex. Min. Cons. 14th August 1847. Ib. I. 281. Sloan's Jud. and Land Rev. Code, I, 559. See, too, 1 Strange H. L. 209: 2 Ibid. 365, 366.

Original Jurisdiction (a)

Original Suit No. 179 *of* 1863.

VI'RASVA'MI GRA'MIṆI *against* AYYASVA'MI GRA'MIṆI.

According to the Hindú law current in Madras the member of an undivided family may alien the share of the family property to which, if a partition took place, he would be individually entitled.

There may be a valid sale of such a share upon an execution in an action of damages for a tort.

Such damages and the costs recovered constitute a judgment-debt in respect of which the execution-creditor's rights are the same as those upon any other judgment for the payment of money.

Special Appeals Nos. 17 *of* 1859 and 113 *of* 1855 affirmed.

Special Appeals Nos. 123 *of* 1859, 183 *of* 1859 and 167 *of* 1859 observed upon.

The *Dáya-bhága* chap. II, sec. 31 noticed.

Although under the Civil Procedure Code the Court is bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible, the Court should confine itself to granting such relief as is prayed in the plaint.

THE relief sought for by the plaintiff was possession of two houses and grounds, numbered respectively 82 and 83 in Chúḷé Bazaar Road, within the local limits of Madras.

1863. *Dec.* 2 *&* 15. *O. S. No.* 179 *of* 1863.

The subject of his claim was as follows:

On the 17th January 1859, the plaintiff filed a plaint in trespass in the late Supreme Court to recover damages against Paḷḷikuḍattán Periya Muniyan, Chinna Muniyan Venkaṭachella Grámiṇi, Rámasvámi Grámiṇi, the defendant Ayyasvámi Grámiṇi and Rámaliṅga Grámiṇi and Murugappa Grámiṇi.

On the 26th day of September 1859, the action came on for trial, and a verdict was found for the plaintiff against all the defendants for the sum of rupees 300.

Judgment was entered up in such action in October 1859 for the sum of rupees 992-14-0, being the amount of verdict and the taxed costs.

On the 27th of October 1859, a writ of fieri facias was issued in the said action, and the Sheriff of Madras under such writ seized the two houses Nos. 82 and 83 in the Chúḷé Bazaar Road; and on the 3rd December 1859, the Sheriff sold all the right, title and interest of the defendants in the two houses to the plaintiff.

(a) Present Scotland, C. J. and Bittleston, J.

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The plaint alleged that the two houses at the time of the sale belonged to the defendant Ayyasvámi Grámiṇi, and he had been residing there ever since.

The cause of action in this suit was non-delivery of possession by the defendant to the plaintiff of the two houses and grounds Nos. 82 and 83 in the Chúḷé Bazaar Road and accrued to the plaintiff in 1859.

Three issues were settled. The first was, whether at the time of the sale by the Sheriff, the two houses and grounds or either of them, were or was the sole and exclusive property of the defendant Ayyasvámi Grámiṇi?

The second issue was, whether the plaintiff by virtue of such sale acquired any and what title or interest in the houses and grounds or either of them?

The third issue was, whether at the time of the sale by the Sheriff there was any valid and subsisting mortgage of the house and ground No. 82.

The Acting Advocate General (Norton) for the plaintiff. The late Supreme Court always supported alienations by an undivided Hindú to the extent of his own share, *Ramasamy* v. *Sashachella(a)*: Colebrooke's opinion on that case, 2 Str. N. C. (ed. 1827) 79, 80 cited infra p. 474. The same rule prevails in Bengal: 1 Morl. Dig. 40, 41. Counsel also cited *Special Appeal No.* 17 *of* 1852*(b)*, *Special Appeal No.* 113 *of* 1855*(c)*.

Mayne, for the first three defendants. The sale by the Sheriff passed no interest in the family property. Even if the sale had been made by Ayyasvámi himself without his co-parceners' consent, the alienation would have been void even as to his own share. *A fortiori* this must be so when the sale is made upon an execution in an action of damages for a tort. The existence of the rule in Bengal is admitted, but there the share of each parcener is, though unascertained, treated as separate even before partition, *Dáya Bhága*, chap. II, sec. 31*(d)*. Otherwise in Madras. Counsel also cited *Special*

(a) 2 Strange N. C. (ed. 1827) 74. (b) Mad. S. Dec. 1853, p. 227.
(c) Mad. S. Dec. 1855, p. 234. (d) "Accordingly [since there is not in such case a nullity of gift or alienation] Nárada says: "When there are many persons sprung from one man, who have duties apart and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."" See, too, 1 Morl. Dig. 536.

Appeal No. 123 *of* 1859*(a), Special Appeal No.* 183 *of* 1859*(b)* and *Special Appeal No.* 167 *of* 1859*(c).*

1863. *Dec.* 2 *&* 15. *O. S. No.* 179 *of* 1863.

Arthur Branson, for the fourth defendant.

The Acting Advocate General replied.

The first and third issues were then found against the plaintiff. But as to the second issue the Court took time to consider, and on the 15th of December the following judgment was delivered by

SCOTLAND, C. J. :—This was a suit for the recovery of two houses and premises numbered respectively 82 and 83, in the Chúḷé Bazaar road, which the plaintiff had purchased at a sale by the Sheriff of Madras under a writ of fieri facias issued to recover the amount of damages and costs in an action of trespass against the defendant Ayyasvámi Grámiṇi and others. Three issues were settled. The first was whether at the time of the sale the houses and premises were the sole and exclusive property of the defendant Ayyasvámi Grámiṇi, and the third, whether at the time of the sale there was any valid and subsisting mortgage of the house No. 82. The Court disposed of these issues at the close of the case, finding the first in the negative and the third in the affirmative, and both against the plaintiff. But the second issue raised a further question whether, assuming the houses and premises to be the property of the undivided family of which Ayyasvámi and the defendants Ayyasvámi Grámiṇi and Deváné Ammáḷ are members, the plaintiff by virtue of such sale acquired any and what title and interest in the same; and upon this question we have now to give judgment.

For the defendants it was contended as a matter of law that the sale by the Sheriff passed no interest whatever in the family property; for that even if it had been an alienation by Ayyasvámi himself without the consent of his coparceners, such alienation would have been void and inoperative even to the extent of his own share; and this being a sale upon an execution in an action of damages for a tort was put as an *a fortiori* case. But we are of opinion that Ayyasvámi might have made a valid alienation of his share

(*a*) Mad. S. Dec. 1860, p. 17. (*b*) Mad. S. Dec. 1860 p. 67.
(*c*) Mad. S. Dec. 1859, p. 270.

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and interest in the property, and that it passed under the sale in execution by the Sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment-debt, and the right of the execution-creditor thereunder, is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindú families not possessing self-acquired property for any wrong, however great, which they may commit.

Mr. Mayne, however, mainly relied upon the general ground that no alienation by a member of an undivided Hindú family without the consent of his co-parceners can bind even his own share; and he asked our consideration of several decisions of the late Ṣadr Court upon this subject. It was not disputed that the course of decision in the late Supreme Court since at least the case of *Ramasawmy* v. *Sashachella(a)*, and the opinion expressed by Mr. Colebrooke in his observations upon that case(b), supported the validity

(a) 2 Strange N. C. ed. 1827, p. 74.

(b) "On the subject of the question which you had lately before you, I entirely agree with you that a mortgage (sale or gift) by one of several joint owners, without the consent of the rest, is invalid for other's shares. In Bengal law, it is clear that it is good for his own share, and for his only. In the other provinces, it is as clear that the act is invalid, as it concerns other's shares; and the only doubt, which the subtlety of Hindú reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is, undoubtedly, as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual aliener; and that an unauthorized alienation by one of the sharers is invalid, beyond the aliener's share, as against the alienees. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property, entrusted to the part-owner who disposes of it, did suppose a power of disposal; or, where he was the only ostensible and avowed owner; and generally, when the acts, or even the silence of the other sharers have given him a credit, and the alienee had not notice(c). I cannot refer you to authority, beyond the passages to which you have already adverted, for this position. I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent or acquiescence, than a matter on which the Hindu law has pronounced specifically: and I do not recollect any passage more express than those to which you have referred, showing that the alienation is invalid as against the alienee.

The case of *Prannath* v. *Calishunker* (d) to which you refer, was, I conceive, determined on the ground of implied consent; the land being answerable for the revenue which the managing owner had engaged on the part of himself and sharers; besides other peculiar circumstances in the case."

(c) See case of *Comarah Pillay* v. *Permal P. and others*.

(d) Reports in *Sudder Adawlut, Bengal*, previously to 1805, p. 40, 51.

of such an alienation to the extent of the alienor's own share: nor that the same rule of law prevails in Bengal. But it was said that there is a foundation for the rule in Bengal which does not exist according to the Hindú law applicable to Madras, for that in Bengal the share of each parcener is treated as separate even before partition, though unascertained.

In support of this the 31st section of the second chapter of the *Dáya Bhága* was referred to. But that section appears to be a quotation from Nárada, and according to Mr. Colebrooke's note to the passage it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in chap. 11, sec. 1, § 26, on the widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text-writers and commentators, makes the observation that "it is not true that, in the instance of re-union [and of a subsisting coparcenery] what belongs to one appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the argument, that the preferable right of the surviving parceners may be deduced by inference from the fact that "the same goods, which appertain to one brother, belong to another likewise," and that "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But according to both schools of Hindú law the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons; and it seems to us that the real ground upon which the widow's right of succession is placed in the *Dáya Bhága* is the authority of Vṛihaspati, who says that "a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives." Adding by way of question "How then should another take his property while half his person is alive?" So that the right in truth rests upon the

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oneness of husband and wife, and not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate as a matter of inference might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. It is further to be observed that whatever distinction there exists in this respect was certainly present to the minds of Mr. Colebrooke and of the Judges who decided the cases above referred to.

It only remains for us to notice the Ṣadr Court decisions to which our attention was called. We have looked at these cases, seven in number, and we find that three of them expressly decide that one of several co-parceners may bind his own share by alienation and that it is liable for his individual debt. These are the decisions to be found at p. 222 of the reports for 1853, at p. 235 of reports of 1855 and at p. 247 of the reports for 1860, which is the latest case. There are, however, in the volume for 1860, two decisions in which the contrary is held. One of these, at page 67, is rested upon the authority of the other at p. 17, and that again is rested upon the authority of the decision at p. 270 of the reports of 1859. Looking at that case it does not seem to go the length supposed in the two last mentioned cases: for the judgment in terms recognizes the power of the co-parcener to confer upon the purchaser a right to what might eventually fall to his share at division, and the suit being for the recovery of a specific portion of property upon an alleged division, which was disbelieved, appears to have been properly dismissed. As to the decision at p. 215 of the reports for 1854, we need only say that the court appears to have proceeded upon the ground that the managing member having the control of the family property in his own hands could not proceed by suit and process to enforce his individual claim against the property.

We see nothing in these decisions that materially conflicts with (and some of them support) the opinion we have above expressed, and Sir Thos. Strange in the first volume of his work of authority, at p. 202, expressly says "that in favour of a *bonâ fide* alienee of un-

divided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition." What the purchaser or execution creditor of the co-parcener is entitled to is the share to which if a partition took place the co-parcener himself would be individually entitled, the amount of such share of course depending upon the state of the family. In this case there appear to be two brothers and a step-mother, and the share of each brother is a moiety. There is no evidence of Ayyasvámi's having sons. If he had, they would no doubt be entitled to shares in their father's moiety, and so the property available for the plaintiff would to the extent of their shares be reduced; and except in this way the existence of sons would not, we think, affect the plaintiff's right. Having then established his right to an undivided moiety subject to a charge for maintenance, we might, as in an action of ejectment in the late Supreme Court, have decreed to the plaintiff possession of the undivided moiety in both the houses, but for the mortgage that has been proved under the third issue; although further proceedings should be necessary in order to realize to the plaintiff the actual enjoyment of the moiety. In suits under the Civil Procedure Code, the court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible; but we think that the court should confine itself to granting such relief as is prayed by the plaint. In the present case therefore, as the suit is simply for the recovery of possession, and as there was at the time of the sale by the sheriff and at the institution of the suit a valid subsisting mortgage of the house No. 82, entitling the mortgagee to possession, the court can only decree to the plaintiff the right to possession of Ayyasvámi's share in the house No. 83.

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The plaintiff is to have the costs of the second issue, to be paid him by the first, third and fourth defendants. The plaintiff will pay all the defendants their general costs of suit.

Appellate Jurisdiction (b)

Regular Appeal No. 45 *of* 1863(b).

PAṆḌAIYA' TE'LAVER and another......*Appellants*.
PULI TE'LAVER and others...............*Respondents*.

The Hindú law independently of special usage or custom does not make illegitimacy an absolute disqualification for caste so as to affect in the relations of life not only the bastard, but also his legitimate children.

A Hindú of a caste governed by the çástras may contract a valid marriage with the daughter of a bastard.

Semble a Çúdra need not marry a wife of the same sect or caste with himself.

The Hindú, unlike the English, law recognizes a bastard's relation to his father and family.

By birth and without any form of legitimation bastards of the three twice-born classes are now reçognized as members of their father's family and have a right to maintenance.

In the case of Çúdras the law has been and still is that bastards succeed their father by right of inheritance.

The presumption of legitimacy where there has been opportunity for sexual intercourse is not irrebuttable.

1863. *August* 3. *R. A. No.* 45 *of* 1863.

THIS was a regular appeal from the decree of J. H. Goldie, the Civil Judge of Tinnevelly, in Original Suit No. 6 of 1859.

This suit was brought to recover possession of the zamíndárí estate of Télaveṅkoṭṭai from the original defendant, who claimed to be entitled to the estate as the undivided brother and heir of the late zamíndár Indiran Rámasvámi Télaver. The zamíndárí is one which descends according to the rule of primogeniture, and the right of the plaintiffs to recover depended upon the proof and validity of the title of the first plaintiff, as the only legitimate son of the late zamíndár by his second wife (the second plaintiff); his first wife having, as alleged by the plaintiffs, borne him no issue, and been put away for improper conduct, and having afterwards married a second husband by whom she had a son. The original defendant set up in answer that the family of the second plaintiff was of a low and inferior caste to that of his deceased

(a) Present Scotland, C. J. and Holloway, J.

(b) The judgments in this appeal were not received by the Reporter until long after the reports of the other cases heard in August 1863 had been printed off.

brother, and that the females of it had been living in concubinage without lawful marriage; that the father of the second plaintiff was illegitimate and the second plaintiff consequently was of no caste, and that by Hindú law a marriage neither did nor could take place. But he admitted the marriage of his brother to the woman stated by the plaintiff to be his wife, and stated that she was divorced for want of chastity and bore no issue to his brother. By order of the lower court, the son of the first wife and his grandmother as guardian (his mother being dead) were made supplemental defendants. Their answers contained a similar denial of the plaintiff's title and asserted that the imputations of frail conduct on the part of the first wife and that she was put away and married again, were false, and claimed that her son was entitled as heir.

The Civil Judge was of opinion that the families of the late zamíndár and the second plaintiff were of the same caste, and that a marriage in fact according to Hindú usage had taken place with the second plaintiff: that she afterwards lived with the zamíndár and was in all respects treated as his wife and that the first plaintiff was the issue of their union. But he decided, acting upon the authority of two opinions of the paṇḍits of the late Ṣadr Court(a) that in law there was no valid marriage on the ground that, as the father of the second plaintiff was illegitimate, she was a person of no caste; and that by Hindú law it was not

(a) *Question submitted by the Civil Court of Tinnevelly to the Paṇḍits of the Ṣadr Court.*

1st Question.—Does the Hindú Law prohibit the marriage of a Hindú with a woman of his own caste whose father was illegitimate, and is such marriage valid or invalid under the Hindú Law?

2nd Question.—Is the marriage of a Hindú of the Maravar(b) caste with a female of the Parivara caste legal under the Hindú Law?

(Signed) J. H. Goldie, *Offg. Civil Judge.*

8th January 1861.

(True copy.)

J. D. Goldingham, *Acting Civil Judge.*

Answer of the Paṇḍits of the Ṣadr Court.

The Hindú Law not only directs a man to espouse a wife of the same class with himself, but likewise forbids him to marry a female devoid of caste or race. The child, male or female, begotten by him of his lawfully wedded wife of the same class with himself, of course belongs to the class of its parents. The son of a kept woman being one, not so begotten, cannot claim the class of his mother or father, and his daughter, destitute as she is of caste, cannot be considered by a Hindú as a "woman of his own

(b) மறவர்.

1863. August 3. R. A. No. 45 of 1863.

competent to the late zamíndár, who was of a caste governed by the çástras, to contract a legal marriage with her. A decree accordingly, was given against the right of the first plaintiff. Against this decree the plaintiffs appealed.

Saḍagópáchárlu (with him *Tirumaláchámiyár*), for the appellants, the plaintiffs.

caste." The marriage of a Hindú of caste with such woman seems from the above law to be forbidden; and it is not, therefore, valid.

2. If the "Maravar caste" and "Parivara caste" be similar in their manners, the marriage of a Hindú of Maravar caste with a female of the Parivara caste would be valid, as being in accordance with the Hindú law. If they be dissimilar, and if the "Parivara caste" be inferior to the "Maraver caste," such marriage would not be valid under the Hindú law. If such marriage be however sanctioned by the custom of the said castes, then it would be good under such custom.

Authority.

Vaidyanátha Dikshitíyam: Manu.—"Let the twice-born man espouse a wife of the same class with himself, and endued with marks of "excellence." Vyása.—"A girl, destitute of relations, or caste, or born "on the day of Róhiní," that is when the moon is in the fourth of the lunar mansions, or devoid of race, must be rejected."

(Signed) Appanaçá'strí', *Senior Paṇḍit, S. C.*
(„) K. Gopá'laçá'strí', *Junior Paṇḍit, S. C.*

19th January 1861.

Question submitted by the Civil Court of Tinnevelly to the Paṇḍits of the Ṣadr Court.

The Paṇḍits of the Ṣadr Court are requested to state, with reference to the reply given by them on the 19th ultimo, in regard to the legality under the Hindú Law of a marriage contracted by a Hindú with a female of his own caste, whose father was illegitimate, whether Hindús of all castes are bound by the said law, and whether in particular it applies to a Hindú of the "Maravar caste." The question has been again put because the Paṇḍits are stated in Strange's Manual of Hindú Law, page 10, to have declared on the 26th June 1854 that among the lower classes of Çúdras, marriage with females, who have lived in concubinage, is allowed. A copy of the question put to the Paṇḍits on the point above referred to and the reply given by them is herewith forwarded.

(Signed) J. H. Goldie, *Offg. Civil Judge.*

5th February 1861.

(True copy.)
J. D. Goldingham, *Acting Civil Judge.*

Answer of the Paṇḍits of the Ṣadr Court.

Our answer dated the 19th ultimo, was intended to show that the law therein set forth applies to Hindús of all classes, who are within the pale of caste. The said law therefore binds all the Hindús who conform to the Çástras, but not those of inferior caste, who depart from them.

The said law would likewise bind the Maravar caste, only if it be governed by the Çástras in all its acts, but not otherwise. It is for this reason that we have stated in our former answer that the marriage referred to in the question would be good under the custom of the said caste.

The answer of the 26th June 1854, referred to in Strange's *Manual of Hindú Law,* applies to Çúdras of inferior castes, who depart from the precepts of the Hindú law.

(Signed) Appanaçá'strí', *Senior Paṇḍit S. C.*
(„) K. Gopá'laçá'strí', *Junior Paṇḍit S. C.*

16th February 1861.

Branson, for the first respondent, the defendant. 1863. *August* 3.

Ritchie, for the second and third respondents, the supplemental defendants. *R. A. No.* 45 *of* 1863.

The argument turned chiefly on the evidence as to the legitimacy of the first plaintiff.

The Court took time to consider and the Chief Justice delivered an elaborate judgment in which, after minutely analysing the evidence, his Lordship stated that the Court had come upon the first point to the conclusion that a marriage in fact did take place, and that the second plaintiff was not taken to live with the deceased as his concubine.

His Lordship then proceeded thus:

The next point is the objection raised to the validity of the marriage on the ground of caste. The case presented by the defendant is that the second plaintiff's father is shown to have been the son of the zamíndár of Pambúli by a concubine of an inferior caste, and the second plaintiff therefore of no caste. The point might perhaps be disposed of on the ground of the insufficiency of the evidence to establish the alleged illegitimacy: but as the decree of the Civil Court rests upon the legal effect of the illegitimacy, we will, assuming it proved, express our opinion as to whether it was in Hindú law a disqualification invalidating the marriage. What the Civil Court appears upon the authority of the paṇḍit's opinions to have decided, and the defendant has contended is, that illegitimacy of the father placed him without the pale of the caste of his parents and consequently his daughter (the second plaintiff) was destitute of caste; and that a valid marriage could not take place between the late zamíndár (he being of a caste that conformed to the çástras) and a woman of no caste.

In the view I take of the law it is unnecessary to make a distinction somewhat refined, and which would at all times be very difficult to ascertain, between a caste of Çúdras conforming in all respects to the çástras, and one that did not so conform, as was pointed out with some effect to be the case with the caste of the late zamíndár. There appears to be no satisfactory ground for the proposition that as respects either caste, the Hindú law, independently of special usage

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or custom, makes illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the person who is illegitimate, but also his legitimate children. Nothing in the way of authority, except the detached passage referred to by the paṇḍits, has been adduced and that passage standing alone cannot be accepted as an authority to that extent. It has been taken, we find, from amongst several other merely directory passages on the subject of personal appearance and form to be found in the work of Vaidyanátha on marriage, and does not appear to have any specific or particular application. I am, further, not aware that any authority can be found for the proposition; and in principle and reason, looking to the rights of property possessed by illegitimate persons, the law would appear to be otherwise. The Hindú law does not, like the English law, consider an illegitimate person *quasi nullius filius*. It recognizes his relationship to his father and family and secures him substantial rights. Under the ancient law it seems that at one time in the case of the three superior or "regenerate tribes" sons not born in lawful marriage had rights of inheritance subsidiary to the "Aurasa," or son by a lawful wife, and could perform obsequies. *Manu* chap. 9 çl. 159, 160, 180: *Mitákshará*, chap. 1 sec. 11; 2 *Strange's H. L.* 194-211; and although this as a general law applicable to those tribes, has, in respect of inheritance, become obsolete; yet it is clear law at the present day that by birth and without any form of legitimation, illegitimate children of those tribes are recognized as members of their father's family and have a right to maintenance. It is also equally clear that in the case of Çúdras the law has been and still is that illegitimate children succeed their father by right of inheritance. *Mitákshará*, chap. 1 sec. 12: *Strange's H. L.* i. 132. Whilst such is the law as to family status and rights of an illegitimate child, it would be anomalous and inconsistent that illegitimacy should be declared to be a taint and disqualification for the membership of caste in the individual and his children. Further, so to decide in this case, would in effect be giving to illegitimacy as a disqualification an operation which it would be contrary to the spirit, if not the letter, of legislative enactment (see Act No. XXI of 1850) to allow to degradation from caste. For these reasons I think that, assuming the illegitimacy of her father, the second plaintiff

was not placed in a different position as regards marriage, from that in which she would otherwise have stood; and apart from this question of illegitimacy, the evidence as already observed, shows that the parties were of different divisions of the same Maravar caste. I am consequently of opinion that the marriage was valid, and the first plaintiff therefore the legitimate son of the late zamíndár.

It is not, however, to be understood that supposing the late zamíndár and the second plaintiff had been of different castes the marriage would in my opinion have been invalid. The general law applicable to all the classes or tribes, does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe the law appears to be no more than directory. Although it recommends and inculcates a marriage with a woman of equal class as a preferable description, yet the marriage of a man with a woman of a lower class or tribe than himself, appears not to be an invalid marriage rendering the issue illegitimate. *Manu* chap. 3 çl. 12 *et seq: Mitáksh.* chap. 1 sec. 11 cl. 2 and note: 1 *Strange's H. L.* p. 40. According to this view of the law, there being no proof of special custom or usage, the marriage would be valid even though the parties had been of different sects or caste-divisions of the fourth or Çúdra class.

Our opinion being in favour of the first plaintiff's legitimacy it becomes necessary to determine whether the alleged heirship of the first supplemental defendant is well founded, for if so, he would be entitled to succeed, and the first plaintiff would fail in making out his title, and here the question of legitimacy depends upon paternity. [His Lordship here analysed the evidence on this point and continued thus:] The conclusion, then, to which I am brought is that the presumption arising from the fact of the first supplemental defendant's birth after his mother's marriage with the late zamíndár has been rebutted, and his legitimacy disproved.

It becomes unnecessary to say anything as to the right of the first plaintiff to succeed to the zamíndárí though illegitimate. The point, however, is not one upon which any doubt would probably be found to exist. Upon the whole then, the appellant (the plaintiff) is entitled to judgment,

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and the decree of the Court, will be, reversing the decree of the Civil Court with costs, that the first plaintiff is the legitimate son of the late zamíndár and entitled to succeed to the possession of the zamíndárí.

HOLLOWAY, J. :—I have never entertained the least doubt that the argument for the invalidity of the marriage, drawn from the alleged illegitimacy of the woman's father, is altogether unsound.

That the son of a Çúdra and of a woman, between whom there has been no formal ceremony of marriage, inherits to the Çúdra, is clearly shown by the authorities quoted at page 49 of the seventh volume of Moore's Indian Appeals(a); and the decision of the Judicial Committee that the illegitimate son of a Kshatriya could not inherit went precisely upon the ground that the father was one of the twice-born tribes. The whole tenor of the judgment shews that if the father had been a Çúdra, the son's right to inherit would have been unquestionable. It follows that the illegitimate son of a Çúdra is not an out-caste.

Moreover, it is not invalid if it took place, because of the difference of class. The opinion of the paṇḍits is, as usual, vague and unsatisfactory. As the twice-born man is instructed to marry a wife of the same class with himself, the reasonable inference is that upon one not twice-born, the precept is not binding.

Further, I am clearly of opinion that the classes spoken of are the four classes recognized by Manu, and not the infinite sub-divisions of these classes, introduced in the progress of time. I think, therefore, that being a Çúdra the woman was of the same class in the sense of the authority quoted.

The argument that, because the parties went through an unnecessary religious ceremony, a marriage which would, if the ceremony had been omitted, have been valid, has by it been rendered invalid, seems to me to have nothing in reason to support it.

That there was a ceremony which, if no disability existed, would have produced a valid marriage, the Civil Judge

(a) Sir Wm. Macnaghten's *Hindú Law* I, p. 18, II, p. 15 n. *Mitákshará* ch. I, sec. 12: *Dáya Bhága* p. 151: *Dattaka Mímánsá* sec. II, cl. 26: *Dattaka Chandriká* sec. V. cl. 30: 3 Coleb. Dig. CL. XXIV, p. 143: Strange's *Hindú Law*, i. 69-132; ii. 168: *Vencataram* v. *Vencata Lutchmee Ummall*, 2 Str. Notes of Cases, 305.

seems to have believed. The oral evidence is supported by the treatment of the woman by the late zamíndár, her lengthened residence with him and his own unquestionable declaration. The utter worthlessness of the evidence on the other side has been sufficiently shewn.

The only real difficulty in the case has arisen from the conflicting claim of the supplemental defendants, one the separated wife of the zamíndár and the other her son. The presumption of legitimacy, where there has been opportunity for sexual intercourse, was at one time pushed by the English Courts to, if not beyond, the verge of absurdity. The law as laid down in a case of the very highest authority*(a)* now is that it is not an irrebuttable presumption of law; but that it may, like other presumptions, be rebutted either by direct evidence or by contrary presumptions. It was also held, following a dictum of Lord Eldon, that the conduct of the parties and their treatment of the child are admissible and most material evidence upon the question.

In this case, as in that, there is evidence on the whole satisfactory that the woman was cohabiting with another man, and there is evidence, which I believe to be true, that she was actually married to another man. Here also there is the circumstance that the birth was not communicated to the person now asserted to be the father. Here, as there, the rights to a valuable property were imperilled by the reticence; and looking at the fanatical love of male offspring in a Hindú and particularly in a Hindú zamíndár, it is certain, that how guilty soever the mother, he would have claimed the child. The mother, too, knowing the valuable property involved, would have taken care that her connexion and that of her son with it should not be severed. Primâ facie there is of course no reason for crediting either set of witnesses; but in this case the circumstances described render it proper to give credit to the allegations of those for the plaintiff. There is, therefore, in my opinion, satisfactory evidence of a perfectly legal marriage with the plaintiff's mother, that he was the fruit of the union and that the supplemental defendant is not the zamíndár's son. There must therefore, in my opinion, be a decree for the plaintiff with costs.

Appeal allowed.

(*a*) *Morris* v. *Davies*, 5 Cl. & Fin. 163 and see *R.* v. *Mansfield* 1 Q. B. 444.

APPENDIX.

The Reporter is indebted to Mr. Arthur Branson for the following copy of Mr. Teed's report of *Náráyaṇasvámi Cheṭṭi* v. *Aruṇáchala Cheṭṭi*, referred to in the argument and judgment in *Vaḷḷináyagam Piḷḷai* v. *Pachché*, supra pp. 330, 336.

SUPREME COURT, WEDNESDAY 8TH FEBRUARY.—On a former occasion we mentioned that the attention of the Supreme Court had been occupied with the question of Hindoo wills. The case arose [in 1832] out of the will of P. Kistnamah Chitty, who was a member of a divided family. He died possessed of a considerable fortune, the principal part of which was self-acquired. He left a widow and an infant son. By his will he bequeathed the greatest part of his property to his brothers, and he left a very inconsiderable share to his son. No provision whatever was made for his widow. A bill was filed by the widow and son against the brothers of the deceased, who were also his executors, seeking to have the will declared invalid, it being contrary to the principles of Hindoo law. The cause was heard, and the Court pronounced a decree in favour of the will. Subsequently the case was re-heard, and the Advocate General and Mr. Teed contended at great length, that testaments were unknown to the Hindoo law, and that a Hindoo had no right by last will to disinherit his natural heir. Mr. Bathie, as Counsel for the defendants, argued on the other side, and the Court took time to consider its judgment. The case is one of considerable importance at this Presidency, and we believe that this is the only instance in which the point has been solemnly decided. We know that, some few years since, the legality of a Hindoo making wills at all, was considered so doubtful, the Court, composed then of Sir Edmund Stanley, Chief Justice, and Sir Charles Grey, Puisne Judge, refused to grant probates to Natives. The practice however seems to have been revived, but how, or when, we know not. This day the Judges gave judgment and we believe the following is the substance of what fell from their Lordships.

P. Narrainsawmy Chitty and Rungamall against *P. Arnachella Chitty* and others. 1832. *February 8.*

SIR R. PALMER, *Chief Justice.*

In this case on behalf of the complainant there were two questions raised. The first, whether a Hindoo can by will dispose of any part of his property from his heirs? and, secondly,—if so, whether to the extent

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this testator has? With regard to the first point, I think it is now, much too late to question it here. The Advocate General in his argument not only seemed to dispute the fact, but that there were decisions to the reverse. I therefore consider it necessary to go at length on this subject. In support of his assertion the Advocate General mentioned two cases which had been decided in this Court, one in March 1821 and the other in May 1818, in both of which cases the wills were set aside. But the circumstances of the cases account for such decisions. In one, *Mootoo Chetty* bequeathed the whole of his property to his five sons, and annexed thereto a direction that no division of the property should take place, or be attempted, under pain of forfeiture of a considerable portion from the shares of such of the brothers as wished for a division. The bill was filed by one of the sons for a division, and by the decree it was declared that the will was not binding on the plaintiff, but that he was entitled to one-fifth of the testator's property. Such a condition is void, for every joint owner has a right to a division. A case is reported in Calcutta in Mr. McNaghten's treatise, pages 324 and 327(*a*). A testator declared the estate should be undivided and a partition was ordered by the Court—it appears therefore that the decree did not proceed on the ground that a Hindoo could not make a will. The other case is still less applicable. There the property divided [devised?] away was common or ancestral property. And if a bequest away from the natural heir whether acquired or ancestral property is the same, where would be the use of making the distinction? Here there is a difference, considering it to be clear in the southern part of India that a Hindoo cannot give away ancestral property, without obtaining a partition of it, and such is laid down in the correspondence between Sir Thomas Strange and Mr. Colebrooke. So much for these decisions; and the reasoning fails, for in the present case the property is all self-acquired and not ancestral. The defendant's counsel mentioned two cases which had occurred here in which wills of Hindoos had been established: that of the *Advocate General* v. *Narsimáloo* and others, I shall leave out of the question—in the other case of the *Advocate General* v. *Annasawmy*, the decision was in favour of testamentary right, and I cannot see any difference between giving property in charity for feeding Bramins, and giving it to brothers or near relations. Besides these cases I shall rely on the decisions of former Judges. The wills of Hindoos have been admitted to probate in the Supreme Court for thirty years past, and on looking at the records which are now left, it appears they had been admitted to probate in the Mayor's Court in 1764, and in examining some of these wills from the style of language used, it is evident they must have been concocted

(*a*) *Nubkissen Mitter* v. *Hurrishchunder Mitter*, Sir F. W. Macnaghten's *Considerations on the Hindú Law*, pp. 323-330.—W. S.

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by Natives, and this does away with Sir Thomas Strange's remark which is not well founded, that the custom of making wills amongst the Natives is to be attributed to Europeans. In examining these records I find a will in 1778, which is of a pure native concoction, and leaves legacies to charities and persons not appearing to belong to the family the amount of 30,000 pagodas. In the same year *Chinnatomby Moodely* by his will leaves every thing to a son he had by a woman who had been living with him. In 1780 *Condapah* who having no children his wife would be his heir, but he makes a will and leaves all his property which was separate and self-acquired to his son-in-law to maintain his wife. There is one other case arising out of the will of *Tondavaroy*, viz., the case of *Vesvanada* v. *Sabaputty* in which the decree was made in May 1806; the property in that case was acquired by the testator, he gave legacies to the amount of 15,000 pagodas, leaving a surplus of nearly 25,000 pagodas, where two-fifths were given away. In the will of *Soobaroy Moodelliar*, who gave a considerable portion of his property to two infants, the plaintiffs were the two infants and their mother who called herself his widow, against his acknowledged wife, who was also administratrix with the will annexed during the minority of her son, the point raised was that he could not make a will, and it was submitted by the answer whether she was compellable to account; the decree of 12th February 1820, directed an account and deposit of title deeds and declared the moveable and immoveable property legally *devised.*

In the case of the will of *Gopaul*, the bill was filed in 1802, the decree establishing the will was made in 1806. The cause was re-heard in May 1806 and a final decree given in 1818, which affirmed the first decree. *P. Narrainsawmy Naidoo* v. *Vasuntapuram Ramasawmy Braminy*. The plaintiff showed that the property bequeathed away was undivided and claimed the same as heir. The defendant, the executor, by his answer stated that the family were separated, and it was submitted whether a Hindoo could make a will. No one can by testament defeat the succession.

There is only one more case which has occurred in this Court that I shall mention—the case of *Chingleroy* v. *Trivatur Annasawmy Moodelliar* arising out of the will of *Maureapah*. The suit was for payment of a legacy and the question raised was that a testator was not at liberty to dispose of his property by a testamentary paper. The case was heard and re-heard, and the decree was affirmed directing the payment of the legacy. It was heard first in October 1816, and it appears a second time in the Registrar's Book of 1816 and 1817. By the decisions in those cases the Court have sanctioned bequests which in part disinherit the heir. In looking at the Regulations of Government, No. III

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of 1802 [sec. XVI] directs the execution of wills to be carried into effect, thereby acknowledging or contemplating Hindoo wills. Twenty-seven years afterwards, in 1829, this regulation is partially rescinded. In the second volume of Sir Thomas Strange's *Elements*, page 414, [2d. ed. p. 426] a case in the zillah of Chingleput, and the following case property is given from the heir. The pundits say the will would be good if only half were given away; but independent of such authorities I must repeat that it is not now to be argued that a Hindoo cannot make a will partly disinheriting his heir.

The next question is can a Hindoo make a will bequeathing away from his heir property to the extent that this man has done? Let us see what the proportions are. It is said that four-fifths are given to his brothers and but one-fifth to his son: it is said that if the bequest is against the Dharma Sastra it is bad; if according to it, it is good. Now where are we to look for these provisions, what is good or bad, but we must look to the law relating to voluntary gifts. The law of gift has been adopted in such cases, and it is stated that a Hindoo can bequeath what he can dispose of by gift, as far as regards self-acquired property; and the question now is whether a testator can give to his brothers four-fifths of his self-acquired property and to his son only one-fifth? I think he can. *Mitâkshará* chap. 1, sec. 2, cl. 9, p. 229. From the passages here quoted a Hindoo has sole power over his self-acquired property; and may give away every pice of it; though he ought not to give away so as to leave his children entirely destitute. After stating what cannot be given it states what can.

Now I shall comment on what can be given away: every thing that will not distress the family, who are entitled to food and raiment, can be given away—gifts good and binding are such as are given to friends and relatives. In Mr. Colebrooke's correspondence with Sir Thomas Strange, it lays down the points on gifts in this part of India: the result of the authorities and pundits is, that, subject to a provision and maintenance for the widow and children, the will is good. Here no such objection exists, although it was objected however that the son was not entitled to the benefit of the legacy till he attained his age of maturity, and that nothing was left to the widow. The testator has not given away all his property, but the remainder is sufficient for their maintenance, and the bill says he left 15 lacs of rupees. And as to the widow all she is entitled to, is food and raiment. My opinion with respect to the will is the same as on the former hearing, that the will is not void but is binding, and I give no opinion with respect to the moveable property which is not bequeathed—at the re-hearing the plaintiff failing to set aside the will, the bill should be dismissed. The doctrine of *Colchester* v. *Colchester*, Select Chancery

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Cases [13 (*a*)] does not apply here. The order was that this cause should be re-heard generally and left it quite open to the defendant to insist on what he has. But although the plaintiff has failed in his re-hearing, he is as son and heir entitled to the residue, and if the allegations in the bill are true there will be a very large sum, and this is sufficient to entitle the plaintiff to have an account. The former decree affirmed without costs.

Sir R. Comyn.—This case involves only one legal question, which is, whether a Hindoo can dispose of his self-acquired property by will? I am of opinion that he can; and in this Court and in Calcutta the wills of Natives are constantly recognized. But the only ground of analogy which I can find to support Hindoo wills is that of gifts. I think a Hindoo might make a gift of all his self-acquired moveable property; and it seems quite clear that he might make an unequal division of his self-acquired property amongst his heirs, but not so if ancestral property. The plaintiff only calls on the Court to set aside his father's will on the ground that a Hindoo cannot make a will. It would be a strange inconsistency if, when we are daily admitting Native wills to probate, [we were] to say that they are illegal.

(*a*) "If the petition of re-hearing be against the decree in general, the whole cause is open; otherwise, if it be only in respect of particular parts of it."—W. S.

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NOTE.—The system adopted in this volume of transliterating Sanskrit and Telugu words will appear from the following table :—

Vowels and Diphthongs, a, á, i, í, u, ú, ṛi* ṛí, ḷi, ḷí, e, ai, o, au.

Gutturals	k,	kh,	g,	gh,	ṅ.
Palatals	ch,	chh,	j,	jh,	ñ.
Linguals	ṭ,	ṭh,	ḍ,	ḍh,	ṇ.
Dentals	t,	th,	d,	dh,	n.
Labials	p,	ph,	b,	bh,	m.
Semivowels	y,	r,	l,	v.	
Sibilants	ç,	s,	sh,	h.	

Anusvára ṃ†, Visarga ḥ.

Of each of the five vargas Tamiḻ possesses only the first and fifth letters. The ள (Tel. and Can. ಳ, Mal. ള) is represented by ḷ: the ற (Tel. and Can. ఱ, Mal. റ) by r': the Tam. ழ Mal. ഴ by ḻ.

* This letter has sometimes been represented by ṛ.

† At p. 49 by ṅ.

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Held, that as to the lands of which C had obtained the actual possession, there was such a privity between A and C, as gave A, a right to realize the amount of kist outstanding in respect of those lands.

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Held :—That the discharging-order did not make the vesting-order void; nor as regarded the estate vested in the Official Assignee did it revest immediately the right of property in the insolvent.

That creditors are entitled to interest on interest-carrying debts out of a surplus remaining in the Official Assignee's hands after payment of the scheduled amount of debts.

That notwithstanding the discharging order the Court might direct the rupees 143-1-8 and the interest subsequently received to be paid to the insolvent's creditors rateably in respect of interest on their debts calculated down to the date of the discharging order and that the balance should be paid to the insolvent or his representative.

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A testator, after requesting that his property be sold and the proceeds invested, gave the following directions:—"That a monthly stipend of rupees 15 be paid to my daughter E. S. for her own benefit and rupees 20 for the benefit of

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her two children during their minority. In like manner my daughter M. D. to be allowed by my executors monthly the sum of rupees 20 for her own benefit and rupees 50 for the benefit of her five children during their minority; and in the event of the demise of any of the above mentioned children occurring, the sum of rupees 10, to cease rateably as being the allowance for each child. That on each of the children attaining their age of majority of 21 years, I request that my executors pay to each of them severally and proportionally the full amount of interest accruing from my estate (the existing provision for my two daughters to continue during their natural life), and after their demise the said interest in like manner to revert to their heir or heirs in succession,"

Held:—1st. That the several annuities to E. S. and M. D. respectively were annuities for their respective lives, and that both annuities were charged on the testator's estate.

2nd. That E. S. and M. D. were respectively entitled to receive during the life-time and minority of their respective children, the monthly sum of 10 rupees for each child; but that on the death of each child, or upon its attaining majority, the payment in respect of such child ceased.

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3rd. That the share of each child under the will, would become vested only on its attaining the age of 21 years: that such share would vary directly as the number of children who had then died infants; and that on each child attaining majority it would take a contingent proportionate interest in the share of each of its junior brothers and sisters, which would become vested on the death of each of the latter under the age of 21 years.

4th. That the estate given to each child in its share was an absolute interest.

5th. *Semble* the rule in *Wild's Case* is not applicable to personalty...... 17

Under a bequest by a Hindú of ten rupees per month, followed by a direction to the following effect: "in this manner continue to pay in the legatee's name so long as he shall be alive: after his death continue to pay the same to his descendants from generation to generation."

Held:—1st. That the legatee took only a life-interest under the bequest.

2nd. That the words "from generation to generation," did not import more than "absolutely" and "for ever" import in an English instrument.

3rd. That the descendants in existence at the time of the tenant for life's death took absolutely as a class, and

4th. That such descendants were entitled in equal shares

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to an amount sufficient to produce the monthly sum of ten rupees.

Remarks on the construction of Hindú wills.

'Descendants' of A in a Hindú will would include children and grand-children living at his decease but does not include A's brother or widow.

There is no rule of Hindú law imposing any restriction in point of time on the operation of a bequest creating a series of successive life-interests in each generation of a legatee's descendants. But

Semble the grounds of the rule against perpetuities are applicable to the property of Hindús, and the Court will be very reluctant to construe a Hindú will so as to tie up property for an indefinite period .... 400, 101 n.

WRITING.

Semble in no case does Hindú law absolutely require writing........................... 100

ZAMI'NDA'R.

Reg. V of 1822 applies only to land subject to a permanent assessment and held from Government by a zamíndár under a permanent sanad or by a temporary occupant... 75

Where an island was formed in a river, the lands adjacent to the banks of which were part of a zamíndárí :—Held that the island was not the waste land of any village or a portion of the holding of any ryots in the zamíndárí, but that the zamíndár possessed in it all the incidents of ownership, including the power of making leases........................ 255

An alienation of a portion of a zamíndári by the zamíndár in favour of his sister cannot operate independently of her claim to maintenance so as to bind his successor, though the alienation may be binding as against the grantor during his life....... 349

A zamíndár has no more power to charge a perpetual annuity in favour of a stranger on the income of the zamíndárí than he has to alienate the corpus.................... 455

A zamíndár granted part of his zamíndárí absolutely and died. His grantee was then dispossessed by a purchaser from his successor:—Held that as the conditions specified in Reg. XXV of 1802, sec. 8 had not been observed by the former zamíndárí, the grant was voidable on the determination of his interest, and that consequently the dispossession was legal................ 148

Where a village, part of a zamíndárí, has been entered as a jágír on the accounts of the permanent settlement, the zamíndár cannot resume the village, and is entitled in respect thereof only to the usual kaṭṭubaḍi....... 355

FINIS.

ADDENDUM TO P. 523, col. 2, line 6:—

'In the absence of a demand in writing, interest up to the date of suit cannot be awarded upon sums, not payable under a written instrument, of which the payment has been illegally delayed.............. 369.'